

06  
MAY 25 1945

No. 1310 89

CHARLES EDMORE GROPLEY  
CLERK

IN THE

# Supreme Court of the United States

DEPARTMENT OF CONSERVATION OF THE  
STATE OF LOUISIANA AND THE PUBLIC  
SERVICE COMMISSION OF THE STATE  
OF LOUISIANA

*Petitioners,*

*versus*

FEDERAL POWER COMMISSION,

*Respondent.*

Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Fifth Circuit.

---

FRED S. LEBLANC,  
*Attorney General of Louisiana,*  
*Baton Rouge, Louisiana;*

SAM H. JONES,  
*Noble Building,*  
*Lake Charles, Louisiana;*

E. LELAND RICHARDSON,  
*409 Reymond Building,*  
*Baton Rouge, Louisiana;*  
*Attorneys for Petitioners.*



## INDEX

	PAGE
Opinions below .....	3
Jurisdiction .....	3
Statute Involved .....	3
Questions presented .....	3-18
Statement .....	19-24
The Statute .....	24-26
Opinion below .....	26-30
Reasons for granting the writ .....	30-47
Joint Resolution of Legislature of Louisiana .....	47
Judgment of United States Circuit Court of Appeals Stayed Pending Disposition of Petition for Certiorari .....	48
Conclusion .....	48
Appendix A .....	49-57
Appendix B .....	58-61

## CITATIONS

### Cases:

Atlantic Cleaners and Dyers vs. United States, 286 U. S. 427 .....	45
Hope Natural Gas Company vs. Federal Power Commission, 320 U. S. 591, 64 Sup. Ct. 281 .....	18, 30-35
Morehead vs. People of State of New York, 298 U. S. 587, 56 Sup. Ct. 918 .....	45
United States vs. American Trucking Associations, 310 U. S. 534, 60 Sup. Ct. 1059 .....	44

## I N D E X—(Continued)

### Statutes:

PAGE

Natural Gas Act of 1938, c. 552, 52 Stat. 821; 15 U. S. C.; Sections: 717, 717 (f) and 717 (r)	PAGE
Sec. 1 .....	3, 24, 25, 27
Sec. 7 .....	3, 12, 14, 15, 25, 31, 32, 42, 46
Sec. 7 (e) .....	19, 20
Sec. 19 (a) .....	21
Sec. 19 (b) .....	3, 19, 23, 24
Joint Resolution of the Legislature of Louisiana, of June 2, 1942 .....	58-61

### Miscellaneous:

Report of Federal Trade Commission transmitted to United States Senate on December 31, 1935, Seventieth Congress, (First Session) .....	PAGE
8, 9, 13, 24, 28	
Opinion of the Federal Power Commission in the case of Tennessee Gas and Transmission Company, 3 F. P. C., 574 .....	32, 35, 36, 42
Brief filed by Federal Power Commission in United States Circuit Court of Appeals, Page 17, Vol. III of the Record, in case at bar .....	32
Opinion No. 114 issued by Federal Power Commisison on April 26, 1944, in case of Hope Natural Gas Company in Dockets Nos. G-507, G-508, G-510, G-516, G-519 .....	37
Twentieth Annual Report of Federal Power Commission, Page 79 .....	41

No. \_\_\_\_\_

IN THE

# Supreme Court of the United States

---

OCTOBER TERM, 1944

---

DEPARTMENT OF CONSERVATION OF THE  
STATE OF LOUISIANA AND THE PUBLIC  
SERVICE COMMISSION OF THE STATE  
OF LOUISIANA

*Petitioners,*

*versus*

FEDERAL POWER COMMISSION,

*Respondent.*

---

Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Fifth Circuit.

---

The Department of Conservation of the State of Louisiana and the Public Service Commission of the State of Louisiana pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on March 31, 1945, rehearing denied April 18, 1945, which affirmed an order of the Federal Power Commission rendered November 21, 1944, granting certi-

ficates of public convenience and necessity to the Memphis Natural Gas Company authorizing the construction of pipe lines from Lisbon, Louisiana to Guthrie, Louisiana and from Guthrie, Louisiana to Memphis, Tennessee to be used for the transmission of natural gas. On June 10, 1944, the Federal Power Commission denied the certificate of public convenience and necessity to construct the line from Guthrie, Louisiana to Memphis, Tennessee, stating in its opinion that:

"In view of the limited natural gas reserves shown by the record to be available to Applicant, their present rapid rate of depletion, and the effect of excessive rates of withdrawal on the ultimate recovery of gas therefrom it is necessary and appropriate in the public interest that such natural gas resources be conserved in so far as possible for domestic, commercial and superior industrial uses.

"The record does not contain a sufficient showing that the proposed construction and operation are or will be required by the present or future public convenience and necessity. Dismissal of the instant application, without prejudice, is appropriate in the public interest."

(Vol. I, pg. 62)

On rehearing the certificate was granted. (Vol. I, pg. 63)

## **OPINIONS BELOW**

The opinion of the Circuit Court of Appeals is not yet officially reported, but appears in the record in Volume 111, at pages 2-9. The opinions of the Federal Power Commission are found at Vol. I, 55-62, 63-79.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on March 31, 1945. An application for rehearing was denied on April 18, 1945. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 19 (b) of the Natural Gas Act.

## **STATUTE INVOLVED**

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821; 15 U.S.C. Secs. 717, 717f and 717r) are set forth in Appendix A.

## **QUESTIONS PRESENTED**

The Federal Power Commission on June 10, 1944, after a full hearing, denied the application of the Memphis Natural Gas Company for a certificate of public convenience and necessity to construct additional natural gas pipe lines from the Monroe, Louisiana, gas field to Memphis, Tennessee, a coal producing state. (Vol. 1, 55-62)

In denying the application, the Commission considered the limited natural gas reserves shown avail-

able to the applicant, and stated that because of the limited reserves, the rapid rate of depletion, and the effect of excessive rates of withdrawal on the ultimate recovery of the gas, it was necessary and appropriate in the public interest that such natural gas resources be conserved insofar as possible for domestic, commercial and superior industrial uses. The Commission thus took into account in denying the application the use to which the gas would be put by the ultimate consumer, and held the natural gas should be conserved insofar as possible for domestic, commercial and superior industrial uses. (Vol. 1, 62)

The Commission granted a rehearing, and on rehearing the case was consolidated with the application of the same company to build a natural gas pipeline from the Lisbon, Louisiana, gas filed to Guthrie, Louisiana, in the Monroe, Louisiana, gas field.

The record on rehearing showed the applicant's facilities ample to properly serve its domestic and commercial customers (Vol 1, 290-A); that the additional natural gas that would be made available if the proposed facilities are constructed would be burned under boilers; the entire record shows that the burning of natural gas under boilers is an inferior use of natural gas; that the City of Memphis, Tennessee, is in a coal producing area and has an ample coal supply. On rehearing the Applicant showed no additional gas reserves available to it under firm contracts, yet the Com-

mission reversed the opinion it rendered on June 10, 1944, and granted the applicant certificates of public convenience and necessity in both cases.

The questions presented are:

1.

Whether or not "public convenience and necessity" as used in the Natural Gas Act, is to be determined by the Federal Power Commission solely, only, and exclusively by consumer demand in the immediate locality where the natural gas would be sold, regardless of the purpose for which the gas will be sold, and regardless of how the gas would be used.

2.

Whether or not the Federal Power Commission is required to consider in connection with the issuance of public convenience and necessity, under the Natural Gas Act, the uses to which the gas would be put if the facilities are constructed.

3.

Whether or not the Federal Power Commission is required, under the Natural Gas Act, to consider matters of conservation, including natural gas reserves and the use to which the gas will be put, in determining, under the Natural Gas Act, that the public convenience and necessity requires the issuance of certificates to construct additional interstate natural gas.

## 4.

Whether or not public convenience and necessity, under the provisions of the Natural Gas Act, require or permit the issuance of certificates of public convenience and necessity to construct additional pipe lines to transport additional gas to a community already served with natural gas where present facilities are more than ample to transport sufficient natural gas for domestic consumption and commercial users, and all additional gas that would be transported through the new facilities would be consumed and burned under boilers; which the record shows is a grossly inferior use, where that same community is adequately supplied with coal and is located in a coal producing area.

## 5.

Whether it is in the public interest or is in derogation of the public interest, as these terms are used in the Natural Gas Act, for the Federal Power Commission to grant certificates of public convenience and necessity to construct additional pipe lines to transport additional gas to areas where present existing facilities are ample to serve domestic and commercial needs of the area, and where the additional natural gas will be put to an inferior use, that is, burned under boilers, where there is an adequate supply of other fuel, namely, coal.

## 6.

Whether or not the public interest referred to in the Natural Gas Act should be construed as the general public interest and the national public interest or should receive a narrow construction so as to mean the local consumer interest, regardless of the use to which gas is put and for what purposes it is consumed.

## 7.

Whether or not, under the Natural Gas Act, the Federal Power Commission and the lower court were required to view the matter from the broad public interest, including the investor interest, the consumer interest, and the more important phase of the public interest, which requires stopping unjust impoverishment of future generations, and whether or not the Federal Power Commission and the lower court, in failing to so view the matter, committed reversible error.

## 8.

Whether or not the Federal Power Commission and the lower court committed error in not holding that the issuance of the certificates of public convenience and necessity was in direct conflict and in derogation of the plain intent of Congress in adopting the Natural Gas Act for the reason that the purpose and intent of the Natural Gas Act adopted by Congress was to limit the use of the remaining resources of this highly valuable, irreplaceable, rapidly exhausting re-

source in a manner to best serve the general public interest, and for the Federal Power Commission to permit by the issuance of certificates of convenience and necessity, the transportation of additional gas to areas where coal is produced and is readily available as fuel, and there dissipate and burn natural gas under boilers, which constitutes a recognized inferior use, was erroneous, and contrary to the provisions of the Natural Gas Act.

## 9.

Section I of the original Natural Gas Act (Act of June 21, 1938) stated that the report of the Federal Trade Commission made at the (70th Congress first session) showed that the transporting and selling of natural gas for ultimate distribution to the public is affected with a public interest, and that federal regulation in matters relating to the transportation of natural gas and sale thereof in interstate and foreign commerce is necessary in the public interest; that in summarizing its voluminous report, the Federal Trade Commission in Part 84-A of Document 92, 70th Congress, First Session, which was transmitted to the Senate under date of December 31, 1935, said:

“... That the subject of natural-gas conservation is one which the Federal Government must approach with caution is understandable to anyone at all familiar with the jurisdictional problems involved. On the other

hand, anyone equally familiar with the economic importance of the commodity itself as a truly national resource, and the shocking and irreparable waste that has attended its exploitation in private hands, can hardly condemn an anxious national concern as to conditions that exist, or deny the national importance of their correction."

(Part 84-A, Page 600)

"... Conservation is the first problem that demands attention. Vast acreage is being drained and natural gas is being subjected to profligate and wanton waste and uneconomical uses."

"... Such a valuable nonreplaceable natural resource of general countrywide use or need should, in the public interest, be conserved and utilized to the highest economic and social advantage."

(Part 84-A, Page 606)

"... Natural gas must be used practically as soon as produced. Therefore, the public concern is that it be produced only as needed, and then that it be used to the highest economic and social advantage. There are no precise parallels in the utility fields for such a situation."

(Part 84-A, Page 613)

Whether or not the declaration of Congress in Section I and the reference to the said Federal Trade Commission report constitutes a criterion in the matter

of issuing certificates of public convenience and necessity, under the provisions of the Natural Gas Act, and whether or not the language of the report of the said Federal Trade Commission, which clearly sets forth the remedy of the evils sought to be eliminated by the Act of Congress, must be considered in construing what constitutes public convenience and necessity under the provisions of the Natural Gas Act.

## 10.

Whether or not there is substantial evidence in the record to support the finding of the Federal Power Commission on rehearing that the applicant has ample natural gas reserves available to justify the issuance of certificates of public convenience and necessity.

## 11.

Whether or not a letter agreement which is not final and which requires further negotiations with third parties constitutes a firm contract for additional natural gas so as to meet the requirements of the Natural Gas Act and whether such tentative letter agreement constitutes sufficient and substantial evidence to warrant the finding that applicant, Memphis Natural Gas Company, has shown its ability to perform its obligations.

## 12.

Whether or not a finding by the Federal Power Commission, under the Natural Gas Act, after pro-  
poundedly considering all facts, that the public con-

venience and necessity require the building of a pipe line, is a finding of fact that is conclusive.

13.

Whether or not public convenience and necessity, under the Natural Gas Act, require or permit the issuance of certificates, under Section 7 of the Act, to build additional natural gas pipe lines to transport natural gas to coal producing areas to be burned under boilers, when approximately ninety-eight percent of the nation's fuel supply is coal and approximately one-tenth of one percent of the nation's fuel supply is natural gas.

14.

Whether or not the issuance of certificates of public convenience and necessity, in such cases, is not in direct contravention of sound conservation practices, and whether or not, the issuance of certificates of convenience and necessity in such cases, does not, in fact, encourage the use of natural gas, an irreplaceable natural resource, as boiler fuel in territories far distant from the natural gas fields, and in territories where there is a bountiful supply of coal, and whether or not, the issuance of certificates in such cases constitutes a gross abuse of discretion by the Federal Power Commission, and whether or not such action is in direct contravention with, and in derogation of, the provisions of the Natural Gas Act.

## 15.

Whether or not, under the provisions of the Natural Gas Act, public convenience and necessity, and the public interest, require or permit the issuance of certificates under Section 7 of the Act to construct additional pipe line facilities to transport additional natural gas to Memphis, when the record shows that approximately eighty-eight percent of all the natural gas sold in the City of Memphis for industrial purposes is burned under boilers, and approximately seventy-six percent of the volume sold for commercial purposes is used for boiler fuel, which constitutes an inferior and uneconomical use of natural gas, especially, where other fuels are readily available. Whether or not, the record contained substantial evidence under these conditions to justify or permit the finding by the Commission that the general public interest and the general public convenience and necessity require or permit the issuance of certificates of convenience and necessity.

## 16.

Whether or not the order of the Federal Power Commission of November 21, 1944, issued in this case, is erroneous and should be reversed for the reason that the record does not disclose substantial evidence to support the conclusion that the general public convenience and necessity require the granting of said certificates because if the proposed facilities are not constructed, curtailments will have to be made only in service to con-

sumers using gas for boiler fuel purposes, which is an inferior purpose, and, whether or not, the use of natural gas for such purposes in areas far distant from natural gas fields and where an ample supply of coal is produced is not in contravention of sound conservation practices, and to permit the use of natural gas for such purposes and encourage same by the issuance of certificates to build additional facilities, constitutes an abuse of discretion on the part of the Federal Power Commission, and whether or not, the order granting the certificates is in derogation of the general public interest within the meaning of the Natural Gas Act.

## 17.

Whether or not it was the purpose and intent of Congress, by adopting the Natural Gas Act, to conserve the limited remaining supply of the irreplaceable natural resource, namely, natural gas, for superior uses, and to limit the use of natural gas to the highest economic and social advantages.

## 18.

Whether or not it was the intent and purpose of Congress, in adopting the Natural Gas Act, to stop the drainage of natural gas reservoirs that are being subjected to profigate and wanton waste and uneconomical uses, especially in view of the reference by Congress in Section 1 of the Act to the report of the Federal Trade Commission.

## 19.

Whether or not Congress intended, by the passage of the Natural Gas Act to recognize the importance of natural gas as a national resource, and to stop the shocking and irreparable waste that has attended its exploitation in private hands, such as building additional pipe lines to transport natural gas to areas far distant from gas fields, and there burn it under boilers where there is an ample supply of coal produced in the area.

## 20.

Whether or not Congress, in adopting the Natural Gas Act, intended that, as stated by the Commission in the original opinion in this case, natural gas resources should be conserved insofar as possible for domestic, commercial and superior industrial uses; and whether or not, the granting of certificates under Section 7 of the Act to build pipe line facilities to transport natural gas to far distant points and there to be burned under boilers in an area where there is an ample supply of coal and in an area where coal is produced, is in derogation of the purposes and requirements of the Natural Gas Act and constitutes an abuse of discretion on the part of the Federal Power Commission in granting such certificates.

## 21.

The certificate of public convenience and necessity involved herein permits the Memphis Natural Gas Company to construct a twenty inch line from Lisbon,

Louisiana, to Guthrie, Louisiana, a distance of approximately forty-nine and one-half miles. The record shows that one-half the capacity of this line will be used to transport gas for the account of the United Gas Pipe Line Company which increases the facilities of the United Gas Pipe Line Company to that extent without the United Gas Pipe Line Company having filed an application for a certificate under Section 7 of the Act. Whether or not the action of the Federal Power Commission in granting a certificate which increases the facilities of United Gas Pipe Line Company without that company obtaining a certificate of public convenience and necessity, is null and void and contrary to the provisions of the Natural Gas Act.

## 22.

Whether or not, in construing the provisions of the Natural Gas Act and determining the authority and duty of the Federal Power Commission in granting certificates under Section 7 of the Act, the Federal Power Commission and the court were required to consider the evil sought to be remedied by Congress in adopting the Natural Gas Act, and whether or not, a failure to do so by the Commission and the Court, constitutes reversible error.

## 23.

Whether or not the Commission and the Court were required, under the provisions of the Natural Gas Act, to take into account and consider the uses to

which the natural gas would be put in determining what constituted public convenience and necessity, and, whether or not, when the record shows that all the additional natural gas would be burned under boilers, which the record conclusively shows is an inferior and wasteful use, the Commission and the Court must conclude that public convenience and necessity do not require the construction of the additional natural gas pipe line facilities.

24.

Whether or not the lower court erred in failing to hold that the Natural Gas Act was passed by Congress in recognition of the necessity of establishing federal legislation over the transmission and sale of natural gas in interstate commerce so that the use of the remaining resources of this highly valuable, irreplaceable, rapidly exhausting natural resource, might be controlled to the extent that the Federal Government might properly exercise such control in a manner to best serve the general public and national interest, rather than the interest of an immediate consuming locality.

25.

Whether or not the lower court erred in failing to hold, under the provisions of the Natural Gas Act, the Federal Power Commission is required to take into consideration matters of natural gas reserves, conservation, end uses, inferior and superior uses of natural gas, in certificate cases, in order to determine public

convenience and necessity, and when the record shows that ample gas is available under existing facilities for domestic and commercial uses, and the additional natural gas claimed needed would be burned under boilers, which constitutes an inferior use and wanton waste of natural gas, in areas where an ample supply of coal is available, the Federal Power Commission is required to find and conclude that public convenience and necessity does not require the building of the additional facilities.

26.

Whether or not there is substantial evidence in the record to support the final and ultimate conclusion of the Federal Power Commission, based on all the facts in the record, that public convenience and necessity require or permit the building of the natural gas pipe lines involved herein.

27.

Whether or not the lower court erred in the following statement in the opinion rendered on March 31, 1935, in the case at bar:

“. . . Assuming without deciding that the Commission could properly consider as one of the facts entering into the granting or denial of the certificates the uses to which the gas was to be put, that is, that considerations of conservation had a place in such granting or refusal, we think it quite plain that the statute does not make such matters determinative. . .”

Whether or not the court erred in making the following statement, in its opinion rendered in this case on March 13, 1945:

“. . . They (Petitioners) insist that all that they are doing is to present evidence that the use to which the gas will be put under the certificates is a most inferior one, and that this being undisputed, the Commission, as a matter of law, could not grant the certificates and we must set them aside. We have looked in vain for a criterion for such action on our part. Petitioners do not point us to, we have found no, guiding language in the Act, or in any decision construing it, which supports this view or, indeed, points in this direction. . .”

Whether or not the court erred in disregarding the language of this Court in the case of Hope Natural Gas Company vs. Federal Power Commission, 320 U.S. 591, 64 Sup. Ct. 281, and whether or not the court erred in completely disregarding the purpose of Congress in adopting the Natural Gas Act as set out in Section 1 of the Natural Gas Act.

## STATEMENT

The Department of Conservation of the State of Louisiana and the Public Service Commission of the State of Louisiana ("Petitioners") seek a review, under Section 19 (b) of the Natural Gas Act (52 Stat. 821; 15 U.S.C., Sections 717-717r), of the Federal Power Commission's order of November 21, 1944, issuing certificates of public convenience and necessity under Section 7 (e) of the Act to the Memphis Natural Gas Company, authorizing the construction and operation of specified facilities for the interstate transportation and sale of natural gas, subject to the commission's jurisdiction.

The Memphis Natural Gas Company ("Applicant"), a Delaware corporation having its principal place of business in Memphis, Tennessee, owns and operates an 18 inch natural gas pipe line which extends from the Monroe gas field in Louisiana, through Arkansas and Mississippi, to the City of Memphis, Tennessee. The natural gas transported through this pipe line is purchased by the Applicant from the Southwest Gas Producing Company, Inc., and United Gas Pipeline Company at Applicant's Guthrie compressor station in Ouachita Parish, Louisiana, and such gas is sold by the Applicant to one direct sale and five wholesale customers, the principal one of the latter being the Memphis Light, Gas and Water Division of the City of Memphis, Tennessee.

On January 31, 1944, the Applicant filed an application with the Federal Power Commission (in F.P.C Docket No. G-522) for a certificate of public convenience and necessity under Section 7 (e) of the Natural Gas Act to authorize the construction and operation of three 18 inch pipe lines, aggregating some 61½ miles in length, to parallel the unlooped portions of its existing pipe line. (Vol. 1, 56)

A public hearing with respect to this application was held before the Commission's Trial Examiner between March 15 and April 17, 1944. (Vol. 1, 56)

Pursuant to leave granted by the Commission, the State of Tennessee, the Memphis Light, Gas and Water Division of the City of Memphis, Tennessee, and the West Tennessee Gas Company of Jackson, Tennessee, intervened in support of the application, while the Public Service Commission of Louisiana, the Department of Conservation of the State of Louisiana, the National Coal Association, the United Mine Workers of America, the Order of Railway Conductors, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Switchmen's Union of North America, intervened in opposition to the application. (Vol. 1, 55-56)

Upon consideration of the record thus made, the Commission, by order of June 10, 1944, found that "In view of the limited natural gas reserves shown by

the record to be available to Applicant, their present rapid rate of depletion, and the effect of excessive rates of withdrawal on the ultimate recovery of gas therefrom, **it is necessary and appropriate in the public interest that such natural gas resources be conserved in so far as possible for domestic, commercial and superior industrial uses**" and that "The record does not contain a sufficient showing that the proposed construction and operation are or will be required by the present or future public convenience and necessity." (Vol. 1, 62)

The application for a certificate to authorize the construction and operation of the proposed facilities to complete the looping of Applicant's main pipe line was accordingly dismissed without prejudice. (Vol 1, 62)

The Applicant on July 10, 1944, filed an application for rehearing under Section 19 (a) of the Act which the Commission granted by order of August 1, 1944. (Vol. 1, 63)

In the meantime, on May 29, 1944, the Applicant had filed (in F.P.C. Docket No. G-549) another application for a certificate of public convenience and necessity to authorize its construction and operation of a 20-inch natural gas pipe line, approximately 49½ miles in length, extending from the Lisbon gas field in Claiborne Parish, Louisiana, to Applicant's Guthrie com-

pressor station in the Monroe field. (Vol. 1, 63) Upon Applicant's request the Commission consolidated the hearing on the second application with the rehearing on the first application. (Vol. 1, 63)

Public hearings in the consolidated proceedings were held before the Commission's Trial Examiner between September 7 and October 5, 1944. (Vol. 1, 63) In addition to the above named intervenors, who had participated in the previous hearing, leave to intervene was also granted to the State of Mississippi, the Oil and Gas Board of the State of Mississippi, the Railroad Commission of the State of Texas, the Corporation Commission of the State of Kansas, the Department of Public Utilities of the State of Arkansas, and the Independent Natural Gas Association of America.

Following the close of these hearings, oral argument was had before the Commission on October 16, 1944. (Vol. 1, 63)

By the order of November 21, 1944, here under review, and the accompanying Opinion No. 119, the Commission found that the construction and operation of the proposed facilities "are and will be required by the present and future public convenience and necessity" and that the Applicant "is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Natural Gas Act, as amended, and the requirements, rules and

regulations of the Commission thereunder". (Vol. 1, 79) The Applicant was accordingly issued certificates of public convenience and necessity authorizing its construction and operation.

Petitioners filed an application for a rehearing on December 9, 1944, with the Federal Power Commission. (Vol. 1, 85). Petitioners' application for a rehearing was denied by the Commission on December 12, 1944. (Vol. 1, 93). Thereafter on December 22, 1944, petitioners filed, in the United States Circuit Court of Appeals for the Fifth Circuit, their petition for review of the Commission's order of November 21, 1944, under Section 19 (b) of the Natural Gas Act.

At the original hearing on the application to build the pipe lines from Guthrie, Louisiana, to Memphis, Tennessee, a full and complete record was made up, and based on this record, the Federal Power Commission emphatically held that, in view of the limited natural gas reserves shown to be available to Applicant and the present rapid rate of depletion and the effect of excessive rates of withdrawal on the ultimate recovery of gas therefrom, it was necessary and appropriate, in the public interest, that such natural gas resources be conserved insofar as possible for domestic, commercial and superior industrial uses. The Commission specifically stated in its opinion that the record did not contain sufficient showing that the proposed

construction and operation were or would be required by the present or future public convenience or necessity. The application to build the lines was denied.

Notwithstanding this rejection of the application to build the lines from Guthrie, Louisiana, to Memphis, Tennessee, by its order of June 10, 1944, on rehearing, the Commission completely reversed its former opinion and issued certificates of public convenience and necessity, only five months after the original opinion was rendered on June 10, 1944. The order issued November 21, 1944, reversing the previous opinion of the Commission, was conditioned upon Applicant beginning the construction of the pipe lines involved by December 15, 1944, only twenty-four days after the order of the Commission reversing the previous order, which rejected the application to construct the lines from Guthrie, Louisiana to Memphis, Tennessee.

Petitioners herein applied to the United States Circuit Court of Appeals for the Fifth Circuit for a stay order under the provisions of Section 19 (b) of the Natural Gas Act, which was granted by three judges.

### THE STATUTE

The Natural Gas Act, (the "Act"), effective June 21, 1938, in Section 1, declared that, as disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83, (Seventieth Congress, First Session), and other reports made pursuant to the

authority of Congress, the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

It is evident from this declaration of Congress, made in Section 1 of the Act, that the very purpose and intent Congress had in adopting the Natural Gas Act was to eliminate, insofar as possible, the evils set forth and deplored in the reports of the Federal Trade Commission and other reports made pursuant to the authority of Congress referred to in Section 1 of the Act.

By Act of February 7, 1942, Congress amended Section 7 of the Natural Gas Act so as to make it unlawful for any company or person to construct facilities for transporting natural gas in interstate commerce without first obtaining a certificate of public convenience and necessity authorizing such construction, said certificates to be issued by the Federal Power Commission.

Section 7 of the Natural Gas Act, as amended, provides that a certificate shall be issued to any qualified applicant if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed, upon showing that the proposed service, sale, operation, construction, extension, or acqui-

sition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise, such application shall be denied.

### **OPINION BELOW**

The opinion rendered by the United States Circuit Court of Appeals, Fifth Circuit, on March 31, 1945, in the case at bar, affirmed Opinion 119 and the order issued in connection therewith, by the Federal Power Commission on November 21, 1944. (Vol. III, 2-9).

The opinion of the Court, in affirming the opinion of the Federal Power Commission, held that the Applicant had showed adequate natural gas reserves. (Vol. III, 3). We submit the Court erred in this finding for the reason that, in our view, the Applicant, in submitting only letter agreements which were not final, as will be shown elsewhere in this petition and brief, failed to show adequate natural gas reserves available to Applicant to justify or even permit the issuance of the certificates of public convenience and necessity herein.

The lower court, on Page 5 of the opinion, held that, "The Commission has also found that the proposed extension is, or will be, required by the present or future public convenience or necessity, and viewing the matter entirely from the standpoint of consumer demand for the gas, the evidence is of such conclusive

character that it demands the finding that was made." We submit, that the lower court erred, in basing the issuance of certificate of public convenience and necessity entirely and solely on consumer demand, regardless of the use to which the gas will be put at its destination. The Commission and the lower court basing the issuance of certificates entirely on consumer demand, completely disregards and ignores the general public interest and the declaration of Congress in Section 1 of the Natural Gas Act, and completely disregards the meaning of "public convenience and necessity" as used in the Act.

The lower court, we submit, erred in holding, on Page 9 of its opinion, as follows:

"... They (petitioners) insist that all that they are doing is to present evidence that the use to which the gas will be put under the certificates is a most inferior one, and that this being undisputed, the commission, as matter of law, could not grant the certificates and we must set them aside. We have looked in vain for a criterion for such action on our part. Petitioners do not point us to, we have found no, guiding language in the Act, or in any decision construing it, which supports this view or, indeed, points in this direction. . . ."

We submit, the lower court erred in the above finding for the reason that the Commission and the

Court failed to construe the meaning of "public convenience and necessity", as used in Section 7 of the Natural Gas Act, in the light of the plain and specific declaration of Congress in Section 1 of the Natural Gas Act in making reference to the report of the Federal Trade Commission, a part of which report is quoted in Paragraph 9 of "Questions Presented" in this petition and brief.

The Court made the following statement in its opinion with reference to the position of petitioners in the case at bar, and the issues squarely presented to the Court for decision.

" . . . Petitioners' reliance, however, is not on the ordinary considerations which control where the dispute is between rival companies, as it was in Arkansas-Louisiana Gas Co. v. Federal Power Commission, 113 F. (2) 281, or over rates or the limits of federal and state power, as it was in cases cited in Note 5, above. They base their whole case on reading the words 'public conveyance and necessity' as including considerations of conservation of natural gas with a consequent prohibition against the issuing of certificates where, as here, there is protest and proof by a state that the gas to be withdrawn under the authority of the certificates will be put to an economically wasteful use, that is to the inferior one of being

burned under boilers. Pointing to the evidence of the already highly developed industrial use of the gas, and the evident purpose to extend and increase that use, petitioners insist that this sustains its burden of showing that the finding of fact by the commission that the issuance of the certificates will be required by the present or future public convenience and necessity, is not supported by substantial evidence. . . ." (Vol. III, 6).

Petitioners also submitted evidence to conclusively show the limited known reserves of natural gas in Louisiana, (Vol. 1, 292-A—299-A, 67-A—85-A) and seriously urged that the remaining reserves should be conserved for superior uses, and to grant certificates of public convenience and necessity to construct additional pipe lines to transport additional natural gas to areas where coal is produced and where there is an adequate supply of coal, and there convert the coal burners to natural gas burners, simply because natural gas is cheaper, constitutes an abuse of the discretion placed in the Federal Power Commission by Congress under the Natural Gas Act, and is in complete derogation of and contrary to the very purpose and intent of the Natural Gas Act.

In the quotation from the opinion of the Court, above, it will be noted the Court recognized the fact that in this case there is protest and proof by the State

that the gas to be withdrawn under the authority of certificates in question, will be put to an economically wasteful use, that is, to the inferior one of being burned under boilers. To issue certificates under such circumstances is, we submit, contrary to the public interest, and is contrary to the intent and purpose of the Natural Gas Act, and by issuing certificates under such circumstances, the Federal Power Commission has abused its discretion.

### **REASONS FOR GRANTING WRIT**

#### **1.**

This case is one of great public significance and the final judgment will have a tremendously important bearing on the future conservation of one of the nation's most important and irreplaceable natural resources, natural gas.

#### **2.**

The issues in this case are squarely presented to the Court for the first time for judicial determination.

#### **3.**

The United States Circuit Court of Appeals, Fifth Circuit, in this case decided an important question of federal law which has not been, but should be, settled by this court.

#### **4.**

While the case of *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 64 Sup. Ct. 281, involved the validity of a rate fixed by the Federal

Power Commission under the Natural Gas Act, the Court in the majority opinion and in the dissenting opinions made statements entirely relevant and pertinent to the construction of the Natural Gas Act in certificate cases under Sec. 7; that Opinion 119 of the Federal Power Commission involved herein and the order issued in connection therewith, and the opinion of the lower court are in conflict with the pronouncements of the court in the Hope case.

### 5.

Since the adoption of the 1942 amendment to the Natural Gas Act by Congress, the Federal Power Commission has been uncertain as to its duties and authority under Section 7 of the Act which authorizes the Commission to issue certificates of public convenience and necessity. The position of the Commission as to what it is required to consider in granting certificates under Section 7 has been inconsistent. Prior to the decision of this Court in the case of *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 64 Sup. Ct. 281, rendered January 3, 1944, the Federal Power Commission took the position that it had no authority to consider the use to which natural gas would be used at its destination in determining whether or not certificates of public convenience and necessity should issue.

After the Hope decision rendered by this Court, the Commission took the position it did have authority

and in fact is required to consider end uses and conservation in determining public convenience and necessity under Section 7 of the Act, and in fact stated in one of its opinions "That considerations of conservation are material to the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act is not open to question. We are deeply cognizant of the necessity for conservation of the country's irreplaceable natural gas resources." (Opinion 114 issued by the Federal Power Commission on April 26, 1944.)

The Commission considered end uses and conservation in refusing the Applicant a permit to build the lines from Guthrie, Louisiana, to Memphis, Tennessee, in the case at bar, and so stated in its opinion. (Vol. 1, 62) It reversed this opinion on November 21, 1944, and granted certificates of convenience and necessity, and in its brief filed in the United States Circuit Court of Appeals, Fifth Circuit, in the case at bar, the Commission stated the Natural Gas Act did not give it authority to consider end uses in the granting of certificates of convenience and necessity, and cited as authority its opinion in the case of Tennessee Gas and Transmission Company, 3 F.P.C. 574, which opinion was rendered September 24, 1943, prior to the decision of this Court in the Hope case, *supra*. (Brief filed by Federal Power Commission in United States Circuit Court of Appeals, Page 17.)

In the case of *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 612, 64 Sup. Ct. 281, 292, the Court, in the majority opinion, said:

“. . . When it comes to cases of abandonment or of extensions of facilities or service, we may assume that, apart from the express exemptions contained in Sec. 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity. . . .”

Mr. Justice Jackson, in his dissenting opinion in the *Hope* case, *supra*, said:

“Solutions of these cases must consider eccentricities of the industry which gives rise to them and also to the Act of Congress by which they are governed.

The heart of this problem is the elusive, exhaustible, and irreplaceable nature of the natural gas itself. Given sufficient money, we can produce any desired amount of railroad, bus, or steamship transportation, or communications facilities, or capacity for generation of electric energy, or for the manufacture of gas of a kind. In the service of such utilities one customer has little concern with the amount taken by another, one's waste will not deprive another, a volume of service can be created equal to demand, and today's demands will not exhaust

or lessen capacity to serve tomorrow. But the wealth of Midas and the wit of man cannot produce or reproduce a natural gas field. We cannot even reproduce the gas, for our manufactured product has only about half the heating value per unit of nature's own."

Further, in the same case, Mr. Justice Jackson said:

"Utilization of natural gas of highest social as well as economic return is domestic use for cooking and water heating, followed closely by use for space heating in homes..."

\* \* \* \* \*

"Industrial use is induced less by these qualities than by low cost in competition with other fuels..."

Further, in the same case, Mr. Justice Jackson said:

"The Commission's concept of the public interest in natural gas cases which is carried today into the Courts' opinion was first announced in the opinion of the minority in the Pipeline case. It enumerated only two 'phases of the public interest: (1) the investor interest; (2) the consumer interest,' which it emphasized to the exclusion of all others. 315 U.S. 575, 606, 62 S. Ct. 736, 753, 86 L. Ed. 1037. This will do well enough in dealing with railroads or utilities supplying manufactured gas, electric power, a communications service or trans-

portation, where utilization of facilities does not impair their future usefulness. *Limitation of supply, however, brings into a natural gas case another phase of the public interest that to my mind overrides both the owner and the consumer of that interest.* Both producers and industrial consumers have served their immediate private interests at the expense of the long-range public interest. The public interest, of course, requires stopping unjust enrichment of the owner. *But it also requires stopping unjust impoverishment of future generations.* The public interest in the use by Hope's half million domestic consumers is quite a different one from the public interest in use by a baker's dozen of industries." (emphasis added.)

Prior to the decision in the case of Federal Power Commission vs. Hope Natural Gas Company, *supra*, the Commission took the position that it had no authority to consider the use to which natural gas would be used at its destination in determining whether or not certificates of convenience and necessity should issue. In its opinion in the matter of the Tennessee Gas & Transmission Company, 3 F.P.C. 574, the Commission stated:

"Interveners representing coal operators, labor unions and railroads, having a vital stake in the coal industry in the Ap-

palachian area, oppose the granting of a certificate for the construction of Applicant's proposed natural-gas pipeline principally on the ground that the present and future fuel needs of that area can be adequately met by coal. It is contended that the use of natural gas for industrial and space-heating purposes constitutes a dissipation of the natural-gas resources, and threatens the coal industry with ruinous competition. Considerable evidence was adduced by these interveners for the purpose of supporting such contentions.

"We recognize the force of these arguments and are not unmindful of the economic and social aspects of the problem posed by these interveners. We are not authorized, however, to regulate rates for natural gas sold directly to industrial consumers, which class of gas sales furnishes the keenest competition to the coal industry. Nor does our power to suspend rates extend to indirect sales of natural gas for industrial purposes. It appears, therefore, that the Natural Gas Act does not vest this Commission with complete and comprehensive authority which would permit us to act as arbiter over the end uses of natural gas."

The opinion in the Tennessee case was rendered on September 24, 1943 by the Commission. On January 3, 1944 this Court handed down its decision in

the Hope Natural Gas Company case, *supra*. Following the Hope decision by this Court, the Federal Power Commission changed its position as expressed in the Tennessee opinion rendered by the Commission, and in Opinion No. 114 issued by the Commission on April 26, 1944 in another case involving the Hope Natural Gas Company (Dockets Nos. G-507, G-508, G-510, G-516, and G-519), the Federal Power Commission said:

"That considerations of conservation are material to the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act is not open to question. We are deeply cognizant of the necessity for conservation of the country's irreplaceable natural-gas resources. Full opportunity was given to the interveners and applicants to present evidence respecting this aspect of the proposed projects. Voluminous evidence was received concerning the end-uses to be made of the natural gas in the area, which is a long-established natural-gas market.

"The evidence shows that the consumers proposed to be served by the projects are primarily those who are now using natural gas or whose service has been recently interrupted due to the gas shortage in the area. The testimony discloses that most of such natural-gas consumption is for residential and high-grade commercial use.

While sales are proposed to be continued to industrial customers now being served or whose service was recently interrupted, such sales are in large part for specialized or superior uses. The quantity of natural gas now being used for boiler fuel for ordinary industrial purposes in the area to be served is negligible. Quoting 'Federal Power Commission v. Hope Natural Gas Co.,' 320 U.S. 591, 88 L. Ed. 276, 288 (Decided January 3, 1944.)"

In its order of June 10, 1944, in the matter of the Memphis Natural Gas Company in Docket No. G-522 (the original order in this case, Vol. 1, 62), the Federal Power Commission said:

"In view of the limited natural gas reserves shown by the record to be available to Applicant, their present rapid rate of depletion, and the effect of excessive rates of withdrawal on the ultimate recovery of gas therefrom, it is necessary and appropriate in the public interest that such natural gas resources be conserved in so far as possible for domestic, commercial and superior industrial uses.

"The record does not contain a sufficient showing that the proposed construction and operation are or will be required by the present or future public convenience and necessity." (Vol. 1, 62)

The salient findings in the order of June 10, 1944, (original order in case at bar, Vol. 1, 55-62), were to the effect that the Monroe Field contained the equivalent of approximately eight years' supply of natural gas at the rate of production which prevailed in January 1944 and that the gas was being withdrawn from the field at too rapid a rate (Vol. 1, 57); that there was available to the applicant in the North Lisbon field the equivalent of approximately nine years' supply based upon withdrawals of forty million cubic feet per day. (Vol. 1, 58)

The Commission found that in 1943, 44.3 per cent of the total sales of natural gas, by the Applicant, represented gas used by industry for steam generation; that 6.9 per cent of the gas sold to industry by the Applicant was for "steam generation in combination with other industrial uses" or a total of 51.2 per cent for such combination of purposes. Similar estimated sales for 1944 amounted to 53 per cent of the total sales. (Vol. 1, 59)

Based on these findings, the Commission refused to issue the certificate to Applicant to build the lines from Guthrie, Louisiana to Memphis, Tennessee, and in refusing the permit said, "In view of the limited natural gas reserves—it is necessary and appropriate in the public interest that such natural gas resources be conserved in so far as possible for domestic, commercial and superior industrial uses." (Vol. 1, 62)

On rehearing, the Commission granted the certificates of public convenience and necessity without Applicant showing additional reserves available under firm contracts. (Vol. 1, 234-A, 244-A-246-A). Applicant produced only letter agreements that were tentative in nature, and required negotiations with third parties before completion, and the record does not show the contracts were completed. (Vol. 1, 234-A, 244-A-246-A). Further, the record on rehearing shows ample gas for domestic and commercial use with present existing facilities. (Vol. 1, 290-A). Applicant's own witness testified maximum peak demand in 1943 in Memphis for natural gas was 40,476 MCF for residential purposes, and 21,450.6 MCF for commercial and commercial heating in Memphis, producing approximate total of 62,000 MCF for these purposes on peak day in 1943 in Memphis. (Vol. 1, 290-A)

The capacity of present system, before facilities applied for in this proceeding, is far in excess of amount necessary to take care of residential, commercial, and commercial heating demand in Memphis on peak day.

The Applicant, in the record, showed more natural gas could be consumed at Memphis by converting present coal burning boilers to natural gas, and prospective new industries that may come to Memphis could burn natural gas under boilers.

The record conclusively shows use of natural gas as boiler fuel constitutes an inferior use of natural gas. The Federal Power Commission in effect held that to be the fact in its decision and order of June 10, 1944, in the case at bar. As early as 1940 it expressed the view that "general use of natural gas under boilers for the production of steam is, however, under most circumstances of very questionable social economy. (Twentieth Annual Report of Federal Power Commission, page 79). The President of the Memphis Natural Gas Company, Applicant herein, in appraising preferential uses of natural gas, placed domestic use at the top of the list and space heating or generation of steam under boilers at the bottom. (Vol. 1, 54-A—59-A) Also see testimony to the effect that burning natural gas under boilers constitutes an inferior use appearing in record, Vol. 1, 79-A—89A.

The Federal Power Commission, in its brief filed in the United States Circuit Court of Appeals, Fifth Circuit, in support of its Opinion 119, and Order issued in connection therewith on November 21, 1944, in the case at bar, which reversed its original order issued June 10, 1944, refusing the certificate to build the line from Guthrie, Louisiana, to Memphis, Tennessee, at page 17, stated:

"With respect to the purposes for which natural gas is used by ultimate consumers, the Act does not vest the Commission "with

complete and comprehensive authority which would permit it to act as arbiter over the end uses of natural gas."

To substantiate the above position, the Commission cited the opinion it rendered on September 24, 1943, in the case of Tennessee Gas & Transmission Co., 3 F. P. C. 574, 479. By taking this position, the Commission reverted to the position it took prior to the decision of this Court in the case of Federal Power Commission v. Hope Natural Gas Company, *supra*.

The inconsistent positions taken by the Commission in certificate cases under Section 7 of the Act, as shown hereinabove, conclusively show the Commission is uncertain as to its authority under the certificate section of the Act. It is tremendously important that it be decided by this Court what factors are determinative in the issuance of certificates of public convenience and necessity under Section 7 of the Act.

## 6.

In determining the meaning of the phrase, "public convenience necessity", as used in the Natural Gas Act, both the Commission and the lower Court have failed to construe this phrase in the light of the declaration of Congress in Section 1 of the Act, which states the reason for adopting the Natural Gas Act.

The Court, in its opinion, (Vol. III, 9), specifically held that there is no criterion in the Natural Gas Act

to support the position of the petitioners. Petitioners urged in the proceedings before the Commission and before the Court that the phrase, "public convenience and necessity", as used in Section 7 of the Act, must be construed in connection with the entire Natural Gas Act, especially Section 1, which refers to the report of the Federal Trade Commission, quoted in part, in this petition and brief in Paragraph 9 of "Questions Presented".

The very purpose Congress had in mind in adopting the Natural Gas Act was to prevent the very thing the Federal Power Commission is attempting to do in the present proceedings. The Federal Trade Commission's report, referred to in Section 1 of the Act, stated that anyone familiar with the economic importance of natural gas as truly a national resource and the shocking and irreparable waste that has attended its exploitation in private hands, can hardly condemn an anxious national concern as to the conditions that exist, or deny the national importance of their correction. (Questions Presented, No. 9). The report of the Federal Trade Commission referred to in Section 1 of the Act, stated that vast acreage is being drained and natural gas is being subjected to profligate and wanton waste and uneconomical uses. (Questions Presented, No. 9).

The report of the Federal Trade Commission stated that natural gas, being a valuable irreplaceable

natural resource of general countrywide use or need, should, in the public interest, be conserved and utilized to the highest economic and social advantage, (Questions Presented, No. 9). The Federal Trade Commission also said that it was a matter of public concern that natural gas be produced only as needed and then it should be used to the highest economic and social advantage, and that there are no precise parallels in the utility fields for such a situation.

Congress, in adopting the Natural Gas Act, sought to remedy the evils referred to in the Federal Trade Commission's report, part of which is referred to in the next preceding paragraphs. We submit that the language, "public convenience and necessity", coupled with the declaration of Congress referring to in the Federal Trade Commission report, constitute a plain and unquestionable criterion that the Federal Power Commission is required to follow in certificate cases, and that the Commission and the lower court erred in holding that there is no criterion to support the position of petitioners in this cause.

This Court, in the case of United States vs. American Trucking Associations, 310 U. S. 534, 541, 60 Sup. Ct. 1059, said:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect

to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation."

In the case of *Morehead vs. People of State of New York*, 298 U. S. 587, 615, 56 Sup. Ct. 918, 925, this Court, in discussing the rule concerning the construction of statutes, said:

"... The 'factual background' must be read in the light of the circumstances attending its enactment. . . ."

In the case of *Atlantic Cleaners and Dyers vs. United States*, 286 U. S. 427, 435, this Court, in construing an Act of Congress, said:

"A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Anti-Trust Act and of the mischief to be remedied, as well as the general trend of debate in both Houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations, and conspiracies in restraint of trade, and to that end to exercise all the power it possessed. . . ."

From the above authorities, it is evident that an act of Congress must be construed in the light of the evils the act seeks to remedy. By adopting the Natural Gas Act, especially Section 7 thereof, requiring certificates of public convenience and necessity, coupled with the declaration in Section 1, referred to hereinabove, there is no question but what Congress fully intended to remedy the evils pointed out in the Federal Trade Commission report, and the Commission and the lower Court erred in not construing the Act accordingly.

## 7.

The record in the case at bar does not contain substantial evidence to support the ultimate conclusion reached by the Federal Power Commission that public convenience and necessity requires the issuance of the certificates in the present proceeding.

## 8.

The tremendous importance of the final decision in this case, and its effect upon the general public welfare is evidenced by the character of the parties intervening in the proceeding. The State of Tennessee, The Light, Gas and Water Division of the City of Memphis, Tennessee, The West Tennessee Gas Company of Jackson, Tennessee, the Railroad Commission of the State of Texas, The Oil and Gas Board of the State of Mississippi, The Corporation Commis-

sion of the State of Kansas, The Department of Public Utilities of the State of Arkansas, The Independent Natural Gas Association of America, The Public Service Commission of the State of Louisiana, The Department of Conservation of the State of Louisiana, The National Coal Association, The United Mine Workers of America, The Order of Railway Conductors, The Brotherhood of Locomotive Engineers, The Brotherhood of Locomotive Firemen and Enginemen, and the Switchmen's Union of North America, intervened in this proceeding. (Vol. II, Pgs. 3 and 4 of the Brief filed by the Federal Power Commission.)

**JOINT RESOLUTION**  
**ADOPTED BY LEGISLATURE OF LOUISIANA**

Appearing in Appendix B of this petition and brief is a copy of joint resolution adopted by the Legislature of Louisiana on June 2, 1942, which authorizes and directs the petitioners herein to represent the State of Louisiana in these and other proceedings before the Federal Power Commission. This resolution details the reasons for the position taken by petitioners in this litigation.

**JUDGMENT OF UNITED STATES CIRCUIT  
COURT OF APPEALS STAYED PENDING  
DISPOSITION OF PETITION  
FOR CERTORARI**

On May 21, 1945, the United States Circuit Court of Appeals entered an order in this case staying the operation and execution of the judgment rendered by that Court on March 31, 1945, and the opinion and order rendered by the Federal Power Commission in this case, pending disposition of this petition for certiorari.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

FRED S. LEBLANC,  
*Attorney General of Louisiana,  
Baton Rouge, Louisiana;*

SAM H. JONES,  
*Noble Building,  
Lake Charles, Louisiana;*

E. LELAND RICHARDSON,  
*409 Reymond Building,  
Baton Rouge, Louisiana;  
Attorneys for Petitioners.*





**APPENDIX A**

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821, et seq. (15 U. S. C. Sec. 717) are as follows:

Sec. 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural

gas. June 21, 1938, c. 556, Sec. 1, 52 Stat. 821.

\* \* \* \*

Sec. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: **Provided**, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities

subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: **Provided, however,** That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within

the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: **Provided, however,** That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary

acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have

the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. As amended Feb. 7, 1942, c. 49, 56 Stat. 83.

Sec. 19. (a) Any person, State, municipality, or State Commission aggrieved by and order issued by the Commission in a proceeding under this Chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the is-

suance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in

whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence, is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence

so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28, as amended.

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1938, c. 556, Sec. 19, 52 Stat. 831.

**APPENDIX B****SENATE CONCURRENT RESOLUTION NO. 7**  
**BY: MR. HENDRICK**

ORIGINATED  
IN THE  
SENATE.

(SIGNED) ROBT. A. GILBERT,  
Secretary of the Senate.

(SIGNED) LEE L. LAYCOCK,  
Clerk of the House.

Senate Concurrent Resolution No. 7. By: Mr. Hendrick  
A Senate Concurrent Resolution.

WHEREAS, it is estimated by the federal departments and agencies that of the nation's reserves of mineral fuel resources, in terms of British thermal units, coal constitutes 98.9 per cent, petroleum one-tenth of one per cent, natural gas one-tenth of one per cent, and oil in shales nine-tenths of one per cent; and

WHEREAS, from 40 to 50 per cent of these mineral fuel reserves are located in that portion of the country lying north of the Ohio and Potomac Rivers and east of the Mississippi River, and but three and two-tenths per cent of such reserves are located in that area usually referred to as the Southwest, comprising the states of Arkansas, Louisiana, Oklahoma and Texas; and

WHEREAS, federal agencies report that for the year 1940 Louisiana produced 343,191 millions of

cubic feet of natural gas, of which 174,366 millions of cubic feet, or 50.80 per cent of the total production, were exported to other states; and

WHEREAS, it is estimated by various federal authorities and agencies that at the 1940 rate of consumption of mineral fuels, the nation's coal reserves are sufficient to last for several thousands of years, while based upon the consumption in the same period the natural gas reserves of the nation will be exhausted in from twenty to thirty years; and

WHEREAS, there are presently on file with and pending before the Federal Power Commission numerous applications for certificates of public convenience and necessity for authorization to construct and operate new and additional natural gas pipe lines having aggregate capacities of many hundreds of millions of cubic feet of gas per day, whose function it will be to transport gas from the fields of the Southwest, including Louisiana, to the great industrial sections of the North and East, located in areas in or closely adjacent to the great coal deposits of those sections of the country, which have for many years been supplied with their fuel requirements by said coal fields; and

WHEREAS, the Federal Power Commission in its report for the year 1940 expresses deep concern with the constantly increasing rate of natural gas withdrawals from the fields of the Southwest, questioning

not only the economic wisdom of such unrestricted withdrawals of gas and its transmission for great distances as a substitute for coal, but expressing apprehension as well as to the effect of such withdrawals of gas on the potentially recoverable reserves of petroleum, through geologic processes; and

WHEREAS, the accelerated depletion of the natural gas reserves of Louisiana will constitute a most serious handicap and bar to the normal industrial development of the state, and now, therefore

BE IT RESOLVED by the Senate of the State of Louisiana, the House of Representatives concurring, that cognizance is hereby taken by the Legislature of Louisiana of the official utterances of the Federal Power Commission, the United States Geological Survey, the National Resources Committee, as well as of other recognized federal authorities, expressing concern over the present unrestricted, unrestrained and indiscriminate withdrawals of gas from the nation's natural gas reserves; and, be it further

RESOLVED that the Legislature of Louisiana hereby approves and commends the announced policy of the Federal Power Commission to inquire into the economic need and justification for, and the geologic consequences of, construction of additional natural gas pipe lines, and especially those projected to areas and

sections of the United States lying immediately in or reasonably adjacent and accessible to the great coal deposits of the nation; and be it further

RESOLVED, that the Department of Conservation of the State of Louisiana and the Louisiana Public Service Commission be and they are hereby directed and authorized to appear before the Federal Power Commission in any and all proceedings before said Commission involving applications for certificates of Public Convenience and Necessity for the construction of additional natural gas pipe lines, or for authority to enlarge the capacity of existing pipe lines, where the supply of gas for transmission by such pipe lines, in whole or in part, originates in the State of Louisiana; and to make such representation to the Federal Power Commission in respect of such applications as may be consistent with this declaration of policy by the Legislature of Louisiana.

(Signed) MARC M. MOUTON  
Lieutenant Governor and President of  
the Senate.

(Signed) R. NORMAN BAUER  
Speaker of the House of Representatives

Baton Rouge, Louisiana

June 2, 1942.



# INDEX

	<i>Page</i>
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Argument	7
Conclusion	13
Appendix	14

## CITATIONS

### Cases:

<i>Alton R. Co. v. United States</i> , 315 U. S. 15	13
<i>Chicago, St. Paul, M. &amp; O. Ry. Co. v. United States</i> , 322 U. S. 1	13
<i>Federal Power Commission v. Hope Natural Gas Co.</i> , 320 U. S. 591	10, 11
<i>Panhandle Eastern Pipeline Co. v. Federal Trade Commission</i> , No. 296, this Term, decided April 2, 1945	8
<i>United States v. Carolina Carriers Corp.</i> , 315 U. S. 475	13
<i>United States v. Maher</i> , 307 U. S. 148	13

### Statutes:

Motor Carrier Act of 1935, Secs. 206 and 207 (49 U. S. C. 306, 307)	13
Natural Gas Act of 1938, c. 556, 52 Stat. 821 (15 U. S. C. 717 et seq.), as amended by the Act of February 7, 1942:	
Section 1	11, 14
Section 4	11
Section 5	11
Section 7	7, 8, 14
Section 19	8, 16

### Miscellaneous:

<i>Federal Power Commission, 1940 Annual Report</i>	10
<i>H. Rep. No. 1290, 77th Cong., 1st Sess.</i>	10, 13

(1)



# In the Supreme Court of the United States

OCTOBER TERM, 1944

---

No. 1310

DEPARTMENT OF CONSERVATION OF THE STATE OF  
LOUISIANA AND THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF LOUISIANA, PETITIONERS

v.

FEDERAL POWER COMMISSION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT*

---

BRIEF FOR THE FEDERAL POWER COMMISSION  
IN OPPOSITION

---

## OPINIONS BELOW

The opinion of the Federal Power Commission of November 21, 1944 (R. 18-35; C. R. 9-29)<sup>1</sup> is reported in 56 P. U. R. (NS) 271. The opinion of the Circuit Court of Appeals (R. 59-67) is not yet reported.

---

<sup>1</sup> In this brief, "R." is used to indicate the record printed by the Clerk of this Court; "C. R." is used to indicate the record printed as an appendix to the Commission's brief below, and filed by petitioner as part of the printed record herein.

**JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on March 31, 1945 (R. 67). A petition for rehearing (R. 68-80) was denied on April 18, 1945 (R. 81). The petition for a writ of certiorari was filed on May 25, 1945. Jurisdiction of this Court is invoked under Section 19 (b) of the Natural Gas Act, and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

The Federal Power Commission, after hearings, issued to an applicant, under Section 7 (e) of the Natural Gas Act, certificates of public convenience and necessity authorizing the construction and operation of specified facilities for the interstate transportation and sale of natural gas. Petitioner, representing the State of Louisiana from which the gas was to be taken, contended before the Commission that the issuance of the certificates would violate "sound conservation practices" in view of the rapid depletion of Louisiana natural gas reserves and the proposed use of a major portion of the gas for "boiler fuel," alleged to be an inferior and uneconomic use. The question presented is whether the Commission, having considered this contention, was required as a matter of law to deny the requested certificates.

**STATUTES INVOLVED**

The applicable portions of the Natural Gas Act are set forth in the Appendix, *infra*, pp. 14-18.

**STATEMENT**

The order here under review issued, pursuant to Section 7 (e) of the Natural Gas Act, certificates of public convenience and necessity to the Memphis Natural Gas Company ("Applicant") authorizing the construction and operation of specified facilities for the interstate transportation and sale of natural gas, subject to the Commission's jurisdiction (R. 35-37).

Applicant, a Delaware corporation having its principal place of business in Memphis, Tennessee, owns and operates an 18-inch natural gas pipe line which extends from the Monroe gas field in Louisiana, through Arkansas and Mississippi, to the City of Memphis, Tennessee. The natural gas transported through this pipe line is purchased by the Applicant from the Southwest Gas Producing Company, Inc., and the United Gas Pipeline Company at Applicant's Guthrie compressor station in Ouachita Parish, Louisiana, and such gas is sold by the Applicant to one direct sale and five wholesale customers, the principal one of the latter being the Memphis Light, Gas and Water Division of the City of Memphis, Tennessee. (C. R. 1-3; R. 26-27.)

On January 31, 1944, the Applicant filed an application with the Federal Power Commission, under Section 7 (c) of the Natural Gas Act, for a certificate of public convenience and necessity to authorize the construction and operation of three 18-inch pipe lines, aggregating some 61½ miles in length, to parallel the unlooped portions of its existing pipe lines (C. R. 2; R. 18). A public hearing was held thereon before the Commission's Trial Examiner between March 15 and April 17, 1944 (C. R. 2), in which leave to intervene was granted to petitioners and others (C. R. 1).<sup>2</sup> On June 10, 1944, the Commission entered an order finding, *inter alia*, that:

(3) In view of the limited natural gas reserves shown by the record to be available to Applicant, their present rapid rate of depletion, and the effect of excessive rates of withdrawal on the ultimate recovery of gas therefrom, it is necessary and appropriate in the public interest that such natural gas resources be conserved insofar as possible for domestic, commercial and superior industrial uses.

---

<sup>2</sup> The State of Tennessee, the Memphis Light, Gas and Water Division of the City of Memphis, Tennessee, and the West Tennessee Gas Company of Jackson, Tennessee, intervened in support of the application. The National Coal Association, the United Mine Workers of America, the Order of Railway Conductors, the Brotherhood of Locomotive Firemen and Enginemen, and the Switchmen's Union of North America, intervened in opposition to the application (C. R. 1; R. 30).

(4) The record does not contain a sufficient showing that the proposed construction and operation are or will be required by the present or future convenience and necessity.

and accordingly ordered the application dismissed "without prejudice" (C. R. 8-9). The Applicant thereupon filed an application for rehearing under Section 19 (a) of the Act, which the Commission granted by order of August 1, 1944 (R. 18).

In the meantime, on May 20, 1944, the Applicant had filed another application for a certificate of public convenience and necessity to authorize its construction and operation of a 20-inch natural gas pipe line, approximately 49½ miles in length, extending from the North Lisbon gas field in Claiborne Parish, Louisiana, to Applicant's Guthrie compressor station in the Monroe field (R. 19).

Upon Applicant's request, the Commission consolidated the hearing on the second application with the rehearing on the first application (R. 19). Public hearings in the consolidated proceedings were held before the Commission's Trial Examiner between September 7 and October 5, 1944, and thereafter oral argument was had before the Commission *en banc* on October 16, 1944 (R. 19).<sup>3</sup>

---

<sup>3</sup> In addition to the intervenors who had participated in the previous hearing (fn. 2, *supra*), leave to intervene was also granted to the State of Mississippi, the Oil and Gas Board of the State of Mississippi, the Railroad Commission of the State of Texas, the Corporation Commission of the

On November 21, 1944, the Commission issued an opinion which reviewed the extensive evidence of record and stated, *inter alia*, that it was "apparent" from "the record made at the former hearing, that the natural-gas supplies available to Applicant at that time were inadequate to warrant the enlargement of its main-line capacity by the installation of the proposed loop-line facilities," but that "the evidence presented at the rehearing shows that Applicant recently made further arrangements to secure substantial additional gas supplies" (R. 23-24). By such opinion and the accompanying order of November 21, 1944, the Commission found that the construction of the proposed facilities "[is] and will be required by the present and future public convenience and necessity," and that the Applicant "is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Natural Gas Act, as amended, and the requirements, rules and regulations of the Commission thereunder" (R. 35). The Commission accordingly issued certificates of public convenience and necessity authorizing Applicant's construction and operation of the proposed facilities, upon the condition, among others, that such facilities "shall not be used for the transportation or sale of natural gas to any new customers of

---

State of Kansas, the Department of Public Utilities of the State of Arkansas, and the Independent Natural Gas Association of America (R. 29-30).

either Applicant or United Gas Pipe Line Company except upon specific authorization by this Commission" (R. 35-37).

The petitioners' application for a rehearing and stay of the Commission's order (R. 10-16) was denied by order of December 12, 1944 (R. 17). Petitioners thereafter filed a petition for review, under Section 19 (b) of the Natural Gas Act, in the Circuit Court of Appeals for the Fifth Circuit (R. 2-8) which handed down its opinion on March 31, 1945 (R. 59-67), and, on the same day, entered its judgment (R. 67), affirming the Commission's order. A petition for rehearing (R. 68-80) was denied by that court on April 18, 1945 (R. 81).

#### **ARGUMENT**

Section 7 (e) of the Natural Gas Act, under which the Applicant sought certificates of public convenience and necessity to authorize the construction and operation of specified facilities for the interstate transportation and sale of natural gas, provides that the Federal Power Commission "shall" issue such certificates:

to any qualified applicant therefor, \* \* \* if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed \* \* \*, and that the proposed service, sale, operation, construction, extension, or acquisition, \* \* \* is or will be required by

the present or future public convenience and necessity \* \* \*.

There is no dispute with respect to the Commission's finding that the Memphis Natural Gas Company was a "qualified applicant" within the meaning of Section 7 (e) of the Act.<sup>4</sup> On the basis of detailed subsidiary findings (R. 1835), the Commission found that the "Applicant is able and willing properly to do the acts and perform the service proposed," and that the construction and operation of the proposed facilities are and will be required by the present and future public convenience and necessity (R. 35).<sup>5</sup> The petition herein seeks to raise twenty-eight questions (Pet. 5-18) many of which are repetitious. In the light of this fact and of Section 19 (e) of the Act prohibiting any party from raising any objection on review of an order of the Commission "unless such objection shall have been urged before the Commission in the application for rehearing" (see *Panhandle Eastern Pipeline Co. v. Federal Power Commission*, No. 296, this term, decided April 2, 1945), we submit that the only questions of substance now before this Court are those relating to "conservation" raised by petition.

<sup>4</sup> Inasmuch as the Applicant was *bona fide* engaged in the interstate transportation and sale of natural gas for resale through its present facilities on February 7, 1942, the effective date of the amendment to Section 7 (e) of the Act, it applied for and was granted a "grandfather" certificate of public convenience and necessity authorizing a continuation of such operations (R. 21, fn. 2).

tioners before the Commission in their petition for rehearing, namely, (1) that the certificates will not further the public convenience and necessity because "if the proposed facilities were not constructed, curtailments would need to be made only in service to consumers using gas for boiler fuel purposes" (R. 11); and (2) that the construction and operation of the proposed pipeline facilities will contravene "sound conservation practices." (R. 10-16).<sup>5</sup>

Petitioners' contention—that the proposed pipeline facilities contravene considerations of "sound conservation practices" in the light of the prospective depletion of the limited natural gas reserves of the State of Louisiana which has neither coal

<sup>5</sup> In its application for rehearing before the Commission (R. 11), and in its instant petition (Pet. 40), petitioners contend that the Applicant failed to show adequate gas reserves available "under firm contracts" to justify construction of the proposed facilities. The Commission made detailed findings on this matter, giving careful consideration to the Applicant's ability to obtain the natural gas reserves necessary to justify the proposed facilities (R. 22-25). As required by the Commission's order (R. 36) "formal contracts" for the supplying of the natural gas have now been filed with the Commission and the question is now academic. Nor is there merit to petitioners' contention (Question 21, Pet. 14-15) that the certificate of convenience and necessity for the construction of a 20-inch pipe line between Lisbon and Guthrie, Louisiana, is null and void because the construction of the proposed line would increase the facilities of United Gas Pipeline Company without that company's having made application therefor. United will not construct or operate any portion of the proposed facilities within the meaning of Section 7 (c) of the Act.

nor water power, and the use of such gas for industrial purposes in Tennessee where coal supplies are ample—furnishes no basis for reversal of the Commission's order. While considerations of conservation pose difficult questions of national policy which are pressing for solution,<sup>6</sup> the instant case does not involve the broad question whether the Commission would have authority to deny applications for certificates of convenience and necessity because of these considerations, but rather, whether the Commission was compelled to deny the certificates because of such considerations. We submit that while "considerations of conservation are material to the issuance of certificates of public convenience and necessity" (*Federal*

<sup>6</sup> In its 1940 Annual Report to Congress, the Commission adverted to the growing importance of the conservation and proper utilization of natural gas and to the possible need for further investigation and additional legislation (R. 32). Thereafter, the House Committee on Interstate and Foreign Commerce, in its Report on H. R. 5249, a bill to amend Section 7 of the Natural Gas Act (H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 4-5), deleted certain portions of the proposed bill, stating that: "The increasingly important problems raised by the desire of several States to regulate the use of the natural gas produced therein in the interest of consumers within such States, as against the Federal power to regulate interstate commerce in the interest of both interstate and intrastate consumers, are deemed by the committee to warrant further intensive study and probably a more detailed and comprehensive plan for the handling thereof than that which would have been provided by the stricken subsection." The Commission responded to this suggestion by instituting, on September 22, 1944 (Docket No. G-580), a comprehensive investigation of the entire problem (R. 33).

*Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 612), the Act does not, as the court below stated, "make such matters determinative" (R. 65).

As held below (R. 66), the "guiding language" of the Natural Gas Act does not support petitioners' assertion that "the commission, as a matter of law, could not grant the certificates" because of considerations of conservation, or the end uses to which the gas may be put.<sup>7</sup> Moreover, as stated in the Commission opinion, "This proceeding does not involve the construction of a pipeline to provide service to new market areas," but "the proposed facilities are required for the rendition of adequate service to Applicant's present customers in its existing markets;" the "total additional gas to be sold by Applicant constitutes only about 1.3 per cent of the total natural-gas production of Louisiana marketed in the year

<sup>7</sup> Under Section 1 (b) of the Act, the Commission's jurisdiction does not include the regulation of the "production and gathering of natural gas," and Section 11 merely directs the Commission to assemble information and report to Congress upon proposed or existing State compacts dealing with the "conservation" of natural gas. Moreover, the Commission has no jurisdiction to regulate "the local distribution of natural gas" (Sec. 1 (b)). Its rate-making authority is limited to interstate sales for resale and does not include the regulation of rates charged for natural gas sold directly to industrial consumers (Sec. 1 (b)), and its authority to suspend a proposed increase in existing interstate wholesale rates does not extend to the "sale of natural gas for resale for industrial use only" (Sec. 4 (e)). See also Sec. 5 (a).

1942;" and "the agreement between Applicant and United contemplates that within a few years a sizable proportion of Applicant's additional gas supplies will come from Texas" (R. 33-34). The Commission further stated that it was "not unsympathetic with the effort of the producing State of Louisiana to protect and conserve its natural gas resources," but that it was "apparent that denial of Applicant's request for these certificates will not afford the State of Louisiana a satisfactory solution of the problem posed by it" (R. 34). With these considerations in mind, the Commission found the certificates to be "required by the present and future public convenience and necessity" (R. 35), expressly prohibiting their use, however, "for the transportation or sale of natural gas to any new customers of either Applicant or United \* \* \* except upon specific authorization" by the Commission (R. 36).

We accordingly submit that the Commission was not required under the Act to deny the requested certificates because of the conservation considerations urged by petitioners. After considering petitioners' contention, the Commission, in the exercise of its administrative discretion, found that the issuance of such certificates was required by the "present" and "future public convenience and necessity." This determination under Section 7 (e) of the Natural Gas Act, as under its prototype, Secs. 206 and 207 (a) of the

Motor Carrier Act of 1935, 49 U. S. C. Secs. 306, 307 (See H. Rep. 1290, 77th Cong., 1st Sess., p. 2), is a "function \* \* \* peculiarly \* \* \* for the Commission, not the courts" (*Alton R. Co. v. United States*, 315 U. S. 15, 23; and see also *Chicago, St. Paul, M. & O. Ry. Co. v. United States*, 322 U. S. 1, 2-3; *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 480; *United States v. Maher*, 307 U. S. 148, 154); and the findings underlying it are not now open to question in this Court.

**CONCLUSION**

The decision below is correct and there is no conflict. We respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,  
*Solicitor General.*

FRANCIS M. SHEA,  
*Assistant Attorney General.*

PAUL A. SWEENEY,  
JEROME H. SIMONDS,  
*Attorneys.*

CHARLES V. SHANNON,  
*General Counsel,*  
*Federal Power Commission.*

JUNE 1945.

## APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821 (15 U. S. C. 717 *et seq.*), as amended by the Act of February 7, 1942, 56 Stat. 83 are as follows:

**SECTION 1.** (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

\* \* \* \* \*

**SECTION 7.** (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construc-

tion or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act [February 7, 1942], over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act [February 7, 1942]. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificates shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certifi-

cate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

\* \* \* \* \*

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

\* \* \* \* \*

SECTION 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a re-

hearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in

part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).





11  
No. 1310

Office - Supreme Court, U. S.  
FILED

89

MAY 31 1945

CHARLES ELIOT DROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1944.

DEPARTMENT OF CONSERVATION OF THE STATE OF LOUISIANA,  
AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF  
LOUISIANA, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

BRIEF OF THE STATE OF TENNESSEE IN OPPOSITION TO PETITION FOR CERTIORARI.

WILLIAM F. BARRY,  
*Solicitor General of Tennessee.*



## INDEX.

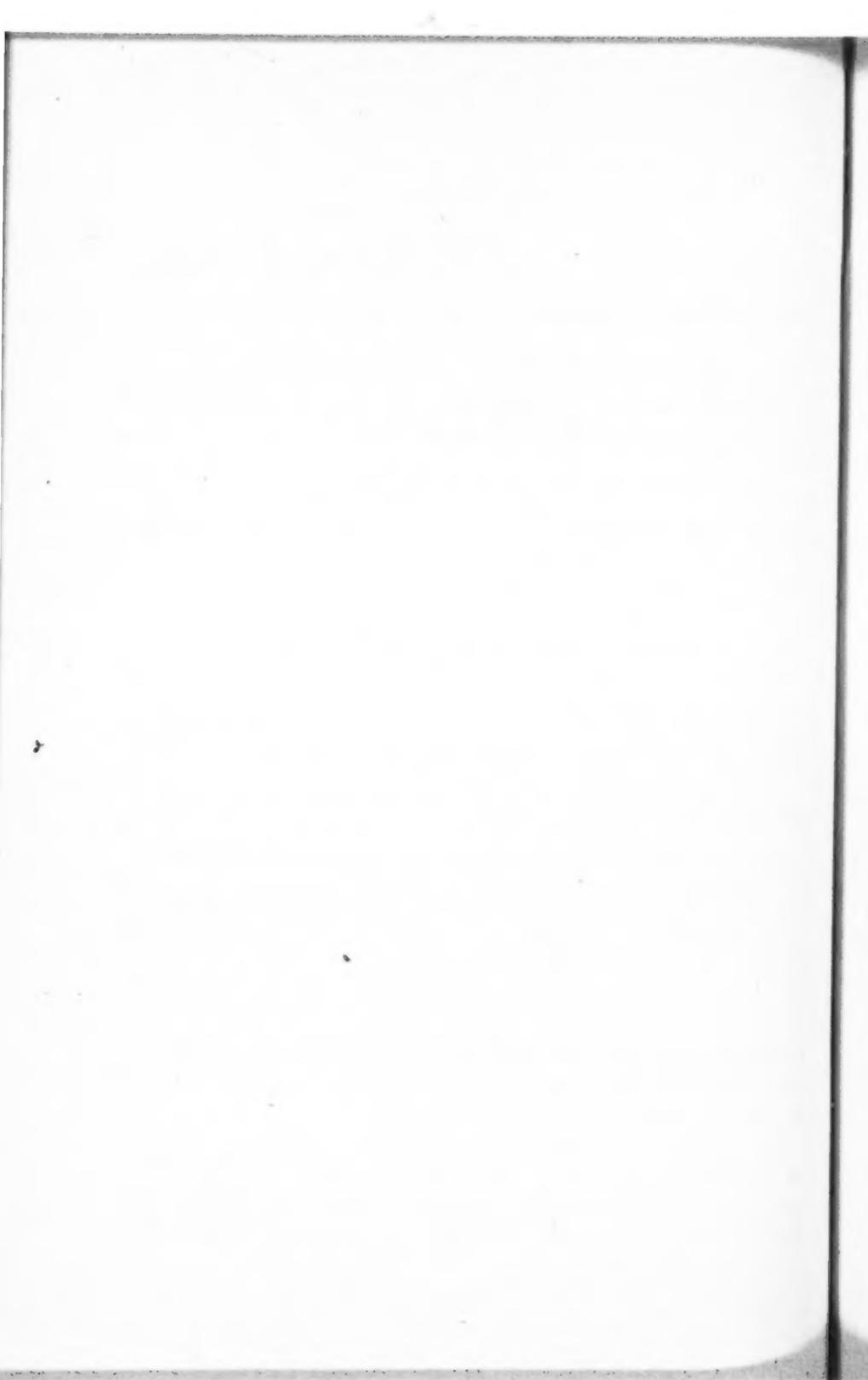
	<u>Page</u>
Introductory Statement .....	1
Facts with Respect to	
Petitioners' Real Position.....	2-9
Testimony of H. W. Bell.....	3-5
Testimony of Gov. Jimmie H. Davis.....	5-8
Brief and Argument.....	9-12

## TABLE OF CASES.

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591.....	10, 11, 12
Foster-Fountain Packing Co. et al v. Haydel, 278 U. S. 1, 74 L. ed. 147.....	10
Haskell v. Kansas Natural Gas Co., 224 U. S. 217, 56 L. ed. 738.....	10
Missouri v. Kansas Natural Gas Co., 265 U. S. 298, 68 L. ed. 1027.....	10
Pennsylvania v. West Virginia and Ohio v. West Virginia, 262 U. S. 553, 67 L. ed. 1117.....	9
West v. Kansas Natural Gas Co., 221 U. S. 229, 55 L. ed. 716 .....	10

## STATUTES.

Natural Gas Act (52 Stat. 833; Title 15 U. S. C. 717- 717W) .....	9
--	---



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1944.

—  
No. 1310.  
—

DEPARTMENT OF CONSERVATION OF THE STATE OF LOUISIANA,  
AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF  
LOUISIANA, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

—  
**BRIEF OF THE STATE OF TENNESSEE IN OPPOSITION TO PETITION FOR CERTIORARI.**

*May It Please the Court:*

The State of Tennessee, acting through its Governor and Attorney General, was expressly permitted by the Federal Power Commission to intervene in the proceeding before said Commission wherein the Memphis Natural Gas Company was seeking certificates of convenience and necessity to install additional facilities to transport natural gas from the State of Louisiana to the City of Memphis, Tennessee, and to other municipalities and counties located in the Western section of Tennessee.

The State of Tennessee has a vital and material interest in the issues before the Court by reason of the fact that the Federal Power Commission by its opinion No. 119, "In the Matters of Memphis Natural Gas Company, Docket No.

G-522 and G-549," has granted certificates of convenience and necessity under which the citizens of many counties and cities in Western Tennessee will be assured of an additional supply of natural gas adequate and sufficient to meet their needs. For these reasons the State of Tennessee respectfully urges this Honorable Court to deny the petition for a writ of certiorari in this cause.

## I.

### **THE FACTS WITH RESPECT TO PETITIONERS' REAL POSITION.**

The petitioners, the Department of Conservation of the State of Louisiana, and The Public Service Commission of the State of Louisiana, undoubtedly represent the position of the State of Louisiana, and in presenting our factual statement, for the sake of brevity, we shall simply refer to the diverse interests and contentions of "Louisiana" and of "Tennessee."

It is admittedly the purpose of Louisiana to set aside the action of the Federal Power Commission in permitting the construction of the additional facilities by the Memphis Natural Gas Company and the withdrawal of the additional natural gas from the natural gas reserves in Louisiana. It is undoubtedly the further purpose of Louisiana to prohibit the transportation of additional quantities of its natural gas in interstate commerce to be used in Tennessee or other states. It is the further purpose of Louisiana to retain such gas within the producing state to be used in substantially the same manner as it is presently used in the importing states, all of which is to the economic benefit of Louisiana and to the severe detriment and injury of importing states.

The foregoing statement may appear to the Court as being a broad and serious charge as to the position taken by Louisiana, and for this reason we desire to quote verbatim from the testimony of Louisiana's witnesses before

the Federal Power Commission, to the end that the position of the State of Louisiana will be clearly before the Court in the language of its own witnesses. The record shows the following testimony of Louisiana's witnesses:

**Testimony of H. W. Bell.**

"Q. Now, Doctor, with reference to the use of natural gas in the State of Louisiana, I will ask you if it isn't used indiscriminately in that State under boilers in industry and in household use, in substantially the same manner as it is used in Memphis, Tennessee?

"A. Yes, sir."

Appendix A to Brief, Memphis Natural Gas Co.,  
(C.C.A.), p. 176.

"Q. Now, is that conservation based on a desire on the part of the State of Louisiana to conserve gas for use in the State of Louisiana, or to conserve it for use nationally, throughout the nation?

"A. For use in the State of Louisiana.

"Q. To the exclusion of use in other States?

"A. That is right."

Appendix A to Brief, Memphis Natural Gas Co.,  
(C.C.A.), p. 177.

"Q. If you know the answer to this question, please give it; Is it the policy of the State of Louisiana to encourage industries from other States to come to Louisiana, on the basis that they may be able to find natural gas available to them there for their use in the manufacture of whatever commodity they prefer?

"A. Yes, sir.

"Q. Has there been any campaign carried on by the State in that respect?

"A. Yes, sir.

"Q. For what period of time, do you know?

"A. Oh, I don't know as I can tell you exactly. Perhaps for 10 years, or such matter.

"Q. Is it still going on?

"A. I believe it is.

"Q. At least, it is insofar as you know?

"A. Yes, sir."

Appendix A to Brief, Memphis Natural Gas Co.,  
(C.C.A.), p. 182.

"Q. Hasn't the use of natural gas, and its availability, been held out as an inducement for manufacturers to locate in the State of Louisiana?

"A. Of course, I never was in on any of those operations or deals, you might say. That has been handled, I believe, by the Department of Commerce and Industry—

Trial Examiner: (Interposing) It seems to me that you are asking the witness for something that he doesn't know anything about.

"Mr. Brunner: I am not so sure that he doesn't.

"By Mr. Brunner:

"Q. Isn't it a matter of public knowledge that the State of Louisiana has held out their natural resources, natural gas, to be available to manufacturers in other parts of the country as an inducement to come to the State of Louisiana?

"A. I think that is largely true."

Appendix A to Brief, Memphis Natural Gas Co.,  
(C.C.A.), p. 183.

"Q. Mr. Bell, from your connection with the Conservation Department, is it not a fact that any industry in the State of Louisiana is permitted to burn as much gas under boilers for steam generation as it desires?

A. Well, I think so. First, of course, they have to find the source of their gas. That doesn't mean that any one gas well would be allowed to produce as much as they want to burn, they may have to get it from five or six gas wells. I want to make that point clear. A gas well is not produced excessively to allow any one plant to get all the gas it wishes. If they find the market, I mean if they find the source, that is true.

"Q. Take an industry located in Baton Rouge, there is no limitation on how much they can burn under a steam boiler at Baton Rouge, is there?

"A. There is no rule set up, but there are some companies that haven't been able to find the gas that they think they need to use, on account of lack of pipelines.

"Q. If they can find the gas, they can use it, that is the point?

"A. That is about it.

"Q. In the State of Louisiana?

"A. Yes.

Appendix A to Brief, Memphis Natural Gas Co.,  
(C.C.A.), p. 184-185.

"Q. Do you have a classification for the use of natural gas for the generation of electric energy?

"A. No, sir.

"Q. You don't compile any statistics showing that separately?

"A. No, sir.

"Q. Is it or is it not a fact that natural gas is used within the State of Louisiana rather extensively for that purpose?

"A. Well, it is to a considerable extent.

"Q. Approximately 35 billion cubic feet per year being used for that purpose?

"A. I really don't know, Mr. May, what the figure would be.

"Q. In any event, there has been no restriction placed by the State of Louisiana on the use of natural gas for boiler fuel purposes or for any other purpose, is that correct?

"A. Except on carbon black, possibly.

Appendix A to Brief, Memphis Natural Gas Co.,  
(C.C.A.), p. 185-186.

#### Testimony of Governor Jimmie H. Davis.

"Q. As I take it, Governor, the paper that you just read into the record expresses your policy as the chief executive of the State of Louisiana, is that correct?

"A. That is right.

"Q. I noticed throughout the entire paper that you used the word, on many occasions, 'exporting' natural gas. Do I correctly understand your position to be that your objection in this particular case is because of the fact that this gas will be exported from the State of Louisiana?

"A. Well, that is the objection."

Appendix A to Brief, Memphis Natural Gas Co.,  
(C.C.A.), pp. 186-187.

"Q. Let me ask you this: Is it the policy of the State of Louisiana that gas should be used within the State without limit, but should not be exported from that State?

"A. I might answer that by saying that we have no other fuel, and that is our gas, and it is there. I have never had anything to say about what they use in Michigan.

"Q. In other words, you want to keep our gas for us home folks, don't you?

"A. Well, I would like for you to have a big say-so in it.

"Q. And you would like to keep it for us within the State for any purpose that any consumer might desire to burn it for?

"A. Well, since we have no other fuel, but even within our own State, as I said in my statement, we have begun to realize that it is passing away, and there is going to be a time when we will have no more, even ourselves."

Appendix A to Brief, Memphis Natural Gas Co.,  
(C.C.A.), p. 187.

"Q. I would like to ask the Governor if it is his position that natural gas, being an exhaustible natural resource, can be retained in the State by action of the State, or should be retained in the State by action of the State, I will put it that way, simply because it is an exhaustible natural resource?

"A. Yes, and because we have no other fuel.

"Q. Would it not be true that each State would be similarly affected, with exhaustible resources within that State, such as phosphate within Tennessee, or sulphur in Louisiana, which you mentioned in your paper, or coal in Kentucky or West Virginia—wouldn't that be true?

"A. Well, if it got to the point where people had to go, so to speak, cold and hungry, due to a shortage of such products, I would say yes.

"Q. If some of the States adopted the same policy with reference to their exhaustible natural resources, would that not create a very definite barrier between the States?

"A. Well, I said in my statement that we didn't seriously object to helping people who had no other fuel, but when you use the gas that we have here, which could be used for superior uses, when you use it for everything when the gas is fast passing away, that is the reason for our objection.

"Q. Is it a part of your position that the retention of that gas in Louisiana would tend to increase the economic development in your State?

"A. Yes, it would. That is the main thing we have to offer.

"Q. Then a part of the position of the State of Louisiana is what might be termed selfish?

"A. No, it is just self-preservation, because if you recall the last few words of my statement, it goes back to the superior uses of gas, and I said in the paper that it was not a case of selfishness.

"Q. The Examiner has ruled out the uses of gas, at least that was my understanding of the preliminary announcement of the Chief Examiner, so that will be all.

"A. I can tell you very frankly that if I thought that Tennessee had gas that would be gone in some twenty or twenty-five years, I wouldn't have the heart to ask them for that gas.

Appendix A to Brief, Memphis Natural Gas Co.,  
(C.C.A.), p. 187-189.

"Q. Governor, you of course are here representing the State, which is opposing the granting of the two applications pending before the Commission. That is correct, is it not?

"A. Yes.

"Q. Now it has developed in the hearing that one of these applications is for the construction of a 20" line from Monroe to Lisbon, which will connect with the system of the United Gas Pipe Line Company, and that gas will be purchased from the United Gas Pipe Line Company, part of which will be produced and brought in from the State of Texas. To the extent that this project involves the purchase and acquisition of gas which might be produced in Texas, you have no objection to that, have you?

"A. Of course I can't answer for Texas.

"Q. I say you.

"A. If it involves Louisiana, if it is a joint deal, then I am opposed to anything that effects a shortage of gas in Louisiana, if that answers your question.

"Q. My question was—does the State, represented by you, have any objection to the construction of facil-

ties to be utilized for the importation of gas from Texas into Louisiana?

"A. Will you ask that question again?

"Trial Examiner: Will the Reporter read it back?

"(The Reporter read the pending question.)

"The Witness: Into Louisiana for what purpose?

"By Mr. Shotwell:

"Q. For the purpose of this project that we are now discussing.

"A. I suppose if Texas wants to pipe it through there that that is the business of Texas.

"Q. My question was—do you as a representative of the State of Louisiana object to that?

"A. Well, so long as it does not affect our State, or the shortage of gas in our State, we have no objection, because I know the predicament that we are in."

Appendix A to Brief, Memphis Natural Gas Co.,  
(C.C.A.), p. 189-190.

It is the position of the State of Tennessee that from the foregoing testimony of Louisiana's witnesses that there can be but one interpretation placed upon such testimony and but one conclusion drawn therefrom, namely, that Louisiana proposes to keep for itself and for its own benefit as much of the natural gas produced in the State as possible, to withhold the gas from the channels of interstate commerce and use it for the economic advancement and development of the State of Louisiana at the expense, inconvenience and economic detriment of other states which have been importing such natural gas in interstate commerce over a period of years.

The position taken by petitioners would result in an unlawful discrimination against the State of Tennessee and its citizens. It is undisputed that for the past seventeen years the natural gas distribution systems in West Tennessee have been purchasing natural gas from the Memphis Natural Gas Company and supplying the same to the large City of Memphis, Tennessee and various other smaller cities situated in West Tennessee. The exact scope of the development of this industry and the vast invest-

ment by the citizens of the State of Tennessee are set out in the opinions of the Federal Power Commission and the Circuit Court of Appeals for the Fifth Circuit. It is not necessary to again present those figures here, but it is sufficient to say that the people of the area affected cannot lawfully be discriminated against in their health, comfort, convenience and investment, and the State of Louisiana or the other states purchasing natural gas from Louisiana benefited thereby.

## II.

### BRIEF AND ARGUMENT.

At the present time there is no Act or statute in Louisiana restricting the exportation of natural gas from the State of Louisiana. From an examination of the Natural Gas Act (52 Stat. 833; Title 15 U. S. C. 717-717W), there is no provision restricting the transportation or removal of natural gas from the state where such gas is taken from the earth to another state where the same is consumed domestically, commercially or industrially. The State of Tennessee takes the position that, under the commerce clause of the Federal Constitution, such an Act, if passed by the State of Louisiana or any other state, would be unconstitutional and void and any state officer endeavoring to enforce a statute forbidding the transportation of gas to points outside of the state could be enjoined by the Federal Courts.

The positions taken by the State of Louisiana and the State of Tennessee in the instant proceeding are substantially similar to the issues decided by this honorable Court in *Pennsylvania v. West Virginia and Ohio v. West Virginia*, 262 U. S. 553, 67 L. ed. 1117. In that case the Court said:

“Another consideration advanced to the same end is that the gas is a natural product of the State and has become a necessity therein, that the supply is wan-

ing and no longer sufficient to satisfy local needs and to be used abroad, and that the Act is therefore a legitimate measure of conservation in the interest of the people of the State. If the situation be as stated, it affords no ground for the assumption by the State of power to regulate interstate commerce, which is what the Act attempts to do." (p. 598.)

"By the Constitution, art. 1, sec. 8, cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws, and to insure uniformity in regulation. \* \* \* All the states have assented to it, all are alike bound by it, and all are equally protected by it." (p. 596.)

Also see:

*Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. ed. 1027.

*Foster-Fountain Packing Co., et al v. Haydel*, 278 U. S. 1, 74 L. ed. 147.

It has been uniformly held that natural gas, when reduced to possession by the owner of the surface, is an article of commerce and the Congress has expressly so recognized it, and provided for its transmission or transportation by pipe lines.

*West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. ed. 716;

*Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 56 L. ed. 738.

The State of Tennessee submits that the foregoing authorities definitely fix the character of natural gas as a proper article in commerce and it necessarily follows that the regulation of this transportation will be determined by Congress.

Upon this point this Court in the case of *Federal Power Commission, et al v. Hope Natural Gas Company*, 320 U. S.

591 (Jan. 1944), (which was a rate case), stated the following on pp. 612 and 613, relative to the construction of the Natural Gas Act:

"We do not mean to suggest that Congress was unmindful of the interests of the producing states in their natural gas supplies when it drafted the Natural Gas Act. As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over 'the production or gathering of natural gas.' Sec. 1 (b). In addition, Congress recognized the legitimate interests of the States in the conservation of natural gas. By Sec. 11 Congress instructed the Commission to make reports on compacts between two or more States dealing with the conservation, production and transportation of natural gas. The Commission was also directed to recommend further legislation appropriate or necessary to carry out any proposed compact and 'to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable and economic production, transportation, and distribution of natural gas.' Sec. 11 (a). Thus Congress was quite aware of the interests of the producing states in their natural gas supplies. \* \* \*."

*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. pp. 612-613.

In the same opinion of the Court, on pp. 617 and 618, the Court made the following pertinent statement:

"Congress has entrusted the administration of the Act to the Commission, not to the courts. Apart from the requirements of judicial review it is not for us to advise the Commission how to discharge its functions."

*Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 617-618.

In the separate opinion of Mr. Justice Jackson, in the same case, 320 U. S. p. 660, it is stated:

"Whether the Commission will assert its apparently broad statutory authorization over prices and discrimi-

nations is, of course, its own affair, not ours. It is entitled to its own notion of the 'public interest' and its judgment of policy must prevail. \* \* \*."

Counsel for the State of Tennessee again points out that this Court was dealing with the question of rates in Federal Power Commission v. Hope Natural Gas Company, *supra*, but during the course of the opinion took occasion to discuss the matter of conservation and the broad powers granted by Congress to the Federal Power Commission. Undoubtedly, under the terms of the Natural Gas Act, it is within the power of the Commission to recommend to Congress additional legislation relative to conservation of natural gas and, as stated by the Court, "to aid in the conservation of natural resources within the United States and in the orderly, equitable and economic production, transportation and distribution of natural gas", as quoted by the Court in the Hope case.

It is, of course, entirely within the province of any state to enact non-discriminatory legislation for the conservation of its exhaustible natural resources. If in the present litigation the State of Louisiana was concerned with the enforcement of some valid non-discriminatory conservation statute, the State of Tennessee would not and could not have any valid legal objection. On the contrary, however, the petitioners are seeking to effect inequitable, unjust and discriminatory distribution of natural gas, to the prejudice of interstate commerce, after the same has been lawfully produced under the laws of the State of Louisiana and has become a lawful article of commerce.

Such being the true circumstances, there can be no merit in the petition and the same should be denied.

Respectfully submitted,

WILLIAM F. BARRY,  
*Solicitor General of Tennessee.*

ANASTASIA PUMA SANTO, *Chairwoman,  
Louisiana, Nationalists*

ANASTASIA PUMA SANTO, *Chairwoman,  
Louisiana, Nationalists*

BRIAN BROWN, *Chairman,  
Combat  
Division,  
Nationalists*

## INDEX.

	Page
Introductory Statement . . . . .	1, 2
Opinion Below . . . . .	2
Jurisdiction . . . . .	2
Statutes . . . . .	3
Question Presented . . . . .	3, 4
How Federal Power Commission and Circuit Court of Appeals Considered and Decided the Questions Presented . . . . .	4
Federal Power Commission . . . . .	4-9
Circuit Court of Appeals . . . . .	9
Statement of the Case . . . . .	9-12
Argument . . . . .	12-14
Delay in Disposition of Petition will be Prejudicial to Public Interest . . . . .	15
Conclusion . . . . .	16

## TABLE OF CASES.

Dobson v. Commissioner of Internal Revenue, 320 U. S. 489 . . . . .	14
Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591 . . . . .	13, 14
Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575 . . . . .	14
Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67, 73 . . . . .	14
Federal Trade Commission v. Pacific States Trade Assn., 273 U. S. 52, 63 . . . . .	14
Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U. S. 498, 510 . . . . .	14
Medo Photo Supply Corp. v. N.L.R.B., 321 U. S. 678 . . . . .	14
N.L.R.B. v. Automotive Maintenance Machinery Co., 315 U. S. 282 . . . . .	14

	Page
N.L.R.B. v. Falk Corp., 308 U. S. 453.....	14
N.L.R.B. v. Link-Bell Co., 311 U. S. 584.....	14
N.L.R.B. v. Nevada Consolidated Copper Corp., 316 U. S. 105.....	14
N.L.R.B. v. Waterman Steamship Corp., 309 U. S. 206, 208.....	14
Public Utilities Commission v. United Fuel Gas Co., 317 U. S. 456.....	14
Rochester Telephone Corp. v. United States, 307 U. S. 125, 128.....	14
Swayne & Hoyt, Ltd. v. United States, 300 U. S. 297..	14

## STATUTES.

Natural Gas Act, 15 U. S. C. Sec. 717 et seq., as amended February 7, 1942.....	3
Section 7(e) .....	3
Section 19(b) .....	3
Judicial Code, Section 240(a) .....	3
Section 350 .....	12

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944.

---

No. 1310.

---

DEPARTMENT OF CONSERVATION OF THE STATE OF LOUISIANA  
AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF  
LOUISIANA, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

---

**BRIEF ON BEHALF OF MEMPHIS NATURAL GAS  
COMPANY AND MEMPHIS LIGHT, GAS AND WATER  
DIVISION OF THE CITY OF MEMPHIS IN OPPOSI-  
TION TO THE PETITION FOR WRIT OF CERTIORARI**

---

*May it please the Court:*

Memphis Natural Gas Company and Memphis Light, Gas and Water Division of the City of Memphis, while not designated in the caption as Respondents, are not only Respondents but are the real parties in interest.

Memphis Natural Gas Company (hereinafter referred to as Pipeline Company) is an interstate pipeline company, and initiated these proceedings by its application for a

certificate of public convenience and necessity to the Federal Power Commission for the purpose of augmenting its facilities so as to supply additional natural gas to meet the needs and demands of its existing city-gate customers, the principal customer being the City of Memphis, Tennessee.

Memphis Light, Gas and Water Division (hereinafter referred to as Division) is a municipal agency and operates the municipally owned utility system for the distribution and sale of natural gas to consumers in the City of Memphis and in Shelby County, Tennessee. The Division purchases its supply of gas exclusively from the Pipeline Company, and Division's requirements constitute more than 80 per cent of the sales of Pipeline Company. It was primarily Division's needs and insistence that caused Pipeline Company to apply to Federal Power Commission for certificates of public convenience and necessity to construct additional facilities to augment its deliverable volume of gas.

Division intervened in the proceedings before the Federal Power Commission, and both Division and Pipeline Company were parties in the proceeding in the Circuit Court of Appeals wherein the Petitioners unsuccessfully sought to set aside the opinion and order of the Commission.

#### **OPINION BELOW.**

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R.59.) is not yet officially reported. The Opinion No. 119 of the Federal Power Commission and the order thereon entered on November 21, 1944, granting the certificates of public convenience and necessity are not yet officially reported and appear in the Record in Appendix to Brief of Federal Power Commission (C.C.A.) pp. 9-32.

#### **JURISDICTION.**

The judgment of the Circuit Court of Appeals was entered on March 31, 1945 (R.67.). Petition for rehearing was filed, and was denied on April 18, 1945 (R.81.). Peti-

tion for writ of certiorari was filed on May 25, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 19(b) of the Natural Gas Act.

### **STATUTES.**

The only statute pertinent is the Natural Gas Act (15 U. S. C. Sec. 717-717w), the pertinent provisions of which are Section (7e) governing the issuance of certificates and Section 19(b) regulating the right of judicial review.

Section 7(e) provides:

“ \* \* \* a certificate shall be issued to any qualified applicant therefor, \* \* \* if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, \* \* \* is or will be required by the present or future public convenience and necessity; \* \* \* ,”

Section 19(b) provides:

“ Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals \* \* \*. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.”

### **QUESTION PRESENTED.**

Initially, it is submitted that the petition for writ of certiorari should be denied on the ground that Petitioners have failed to comply with Rules 27 and 38 of this Court, in that (1) Petitioners have not concisely stated what ques-

tions are presented, and have set forth no less than 28 numbered questions, and their statement of the questions presented is inaccurate, repetitious and confusing, and (2) the assigned errors intended to be urged are not properly expressed.

Since Petitioners have failed to state clearly and concisely the real questions presented, we know of no better manner of setting forth the real questions involved than by quoting the Circuit Court of Appeals' summary of Petitioners' contentions:

"They [Petitioners] base their whole case on reading the words 'public convenience and necessity' as including considerations of conservation of natural gas with a consequent prohibition against the issuing of certificates where, as here, there is protest and proof by a state that the gas to be withdrawn under the authority of the certificate will be put to an economically wasteful use, that is to the inferior one of being burned under boilers. Pointing to the evidence of the already highly developed industrial use of the gas, and the evident purpose to extend and increase that use, petitioners insist that this sustains its burden of showing that the finding of fact by the commission, that the issuance of the certificate will be required by the present or future public convenience and necessity, is not supported by substantial evidence." (R. 63.)

#### **HOW FEDERAL POWER COMMISSION AND CIRCUIT COURT OF APPEALS CONSIDERED AND DECIDED THE QUESTIONS PRESENTED.**

Both the Federal Power Commission and the Circuit Court of Appeals maturely considered Petitioners' contentions, as clearly appears from their respective opinions. The opinion of the Federal Power Commission so clearly and concisely reviews the contentions and questions presented that we quote therefrom, as follows:

"The positions taken by the interveners are divergent. The principal contentions may be briefly

summarized as follows: The Memphis Light, Gas and Water Division of the City of Memphis, supported by the State of Tennessee, contends that Memphis is a rapidly growing community requiring additional volumes of natural gas for its population and its expanding industries; that unless the proposed facilities are installed it will be necessary on winter peak days to curtail or completely interrupt service to essential industries, commercial enterprises, and other customers having no standby-fuel equipment, thereby impairing the welfare and normal growth of Memphis; and that the unlooped portions of Applicant's main line constitute a hazard to service which should be alleviated by the installation of the proposed dual main lines.

"The Public Service Commission of Louisiana and the Department of Conservation of that State vigorously oppose the granting of the certificates. The contention is that while Louisiana has natural-gas resources, it is not endowed with local deposits or water power; that the remaining gas reserves in that State are approximately  $8\frac{1}{2}$  trillion cubic feet; that such reserves are being withdrawn at the rate of some  $\frac{1}{2}$  trillion cubic feet per year, indicating a remaining life on the basis of such withdrawals of about 17 years; and that such irreplaceable natural-gas resources should be conserved for use within Louisiana—not transported to distant markets outside the State for use by competing industries where other fuels are available.

"In opposition to the issuance of the certificates, the National Coal Association, United Mine Workers of America, and railroad labor unions argue that 88 percent of all gas sold in Memphis for industrial purposes and 76 percent of the volume sold for commercial purposes is used for boiler fuel; that the industrial and commercial customers of Mississippi Power & Light Company likewise consume in excess of 90 percent of their gas as boiler fuel; that in the interests of sound conservation coal should be used instead of natural gas for boiler fuel or other so-called inferior purposes; and that the public convenience and necessity do not require the granting of the certificates, because, if the

proposed facilities were not constructed, curtailments would need to be made only in service to consumers using gas for boiler-fuel purposes. No distinction is made, however, in this argument between boilers in power plants and large industries on the one hand, and boilers in small commercial establishments, office and apartment buildings, schools, hospitals, theaters and hotels on the other hand. It is conceded, moreover, that if the deliverability of the Monroe field is declining at the rate of 15 percent per year 'it will be necessary to obtain supplies from other fields in the comparatively near future.'

"In reply to the argument of the coal and labor interests, Applicant contends that if it were deprived of its boiler-fuel loads, increased rates to domestic and commercial users would inevitably result.

"The Railroad Commission of Texas and the Independent Natural Gas Association of America contend that the Natural Gas Act does not vest us with any authority over the end-uses of natural gas, and therefore, that we cannot lawfully give effect to such considerations in determining the issue of public convenience and necessity. In sharp contrast to the position of Louisiana, the Texas Commission desires that no Federal restrictions whatever be imposed on the exportation of natural gas from Texas.<sup>12</sup>

"The State of Tennessee contends that the attitude of Louisiana in this proceeding is 'discriminatory' against Tennessee, since large quantities of gas are now being exported from Louisiana to other States, including Texas, Arkansas, Mississippi, Missouri, Illinois, Alabama, Georgia, and Florida, without restrictions.

"Additionally, it is noted that a representative of numerous land and royalty owners in the Lisbon gas field has urged that the applications be granted, stat-

---

<sup>12</sup> Counsel for the Texas Commission stated:

"We are great marketers of natural gas in Texas and we feel that the better the market, the larger the market, the better the price, and the better the price, the easier it is to prevent physical waste of natural gas, because then you have landowners and everyone else undertaking to prevent waste and hold it down."

ing that the proposed Lisbon line would furnish the only dependable outlet for the sale of their gas.

"These conflicting contentions have been given our careful consideration. We have been keenly aware of the necessity of finding a satisfactory solution to the many perplexing problems thus posed, not only in these proceedings, but also in other cases arising under Section 7 of the Natural Gas Act. In our 1940 Annual Report to Congress (at pp. 79-80), we directed attention to the growing importance of certain of these problems and suggested the necessity for further investigation and additional legislation. The Committee on Interstate and Foreign Commerce of the House of Representatives, in its report on H. R. 5249, a bill to amend Section 7 of the Natural Gas Act (H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 4-5), deleted certain portions of the proposed bill, stating that:

'The increasingly important problems raised by the desire of several States to regulate the use of the natural gas produced therein in the interest of consumers within such States, as against the Federal power to regulate interstate commerce in the interest of both interstate and intrastate consumers, are deemed by the committee to warrant further intensive study and probably a more detailed and comprehensive plan for the handling thereof than that which would have been provided by the stricken subsection.'

"These events, coupled with the growing intensity of the conflict between opposing interests in certificate cases coming before us under Section 7 of the Act, led to our adoption, on September 22, 1944, of an order in Docket No. G-580 instituting a comprehensive investigation of the entire problem. The Governors and regulatory and conservation commissions of each of the States, the Interstate Oil Compact Commission, the natural-gas industry, the coal, railroad and labor organizations, and other interested parties have been invited to file statements of their views and suggestions concerning the matters to be covered in such investigation and the procedure which should be followed. Hearings are to be held as soon as prac-

ticable, at which all interested persons will be given full opportunity to present their views.

"At the outset of the rehearing, it was announced that the Commission would institute the general investigation, above referred to, and counsel, were invited to cooperate in confining the hearing to the facts substantially and immediately affecting the pending applications. The instant proceedings are necessarily limited to the issues raised by such applications and must be decided on the record before us. It is apparent that we did not undertake in these proceedings the broad investigation instituted by our order entered in Docket No. G-580.

"This proceeding does not involve the construction of a pipe line to provide service to new market areas. The evidence shows that the proposed facilities are required for the rendition of adequate service to Applicant's present customers in its existing markets. When completed, such facilities will not permit Applicant to serve more than an additional 21,000 Mcf per day to its customers. Moreover, Applicant is now obtaining its natural-gas supplies from the Monroe field from which large volumes of natural gas are being transported to markets outside of Louisiana. Applicant proposes initially to obtain its additional natural-gas supplies from the Lisbon field, the entire output of which, substantially, is now being exported from Louisiana, and will continue to be exported under existing contracts whether or not these applications are granted. The total additional gas to be sold by Applicant constitutes only about 1.3 percent of the total natural-gas production of Louisiana marketed in the year 1942. Furthermore, the agreement between Applicant and United contemplates that within a few years a sizable proportion of Applicant's additional gas supplies will come from Texas.

"While we are not unsympathetic with the effort of the producing State of Louisiana to protect and conserve its natural gas resources for the benefit of its citizens, it is apparent that denial of Applicant's request for these certificates will not afford the State of Louisiana a satisfactory solution of the problem posed by it. Such problem cannot be determined within the limits of these proceedings. It is reasonable, however,

to condition the certificates so that the facilities herein authorized shall not be used for the transportation or sale of natural gas to any new customers of either Applicant or United except upon specific authorization by this Commission."

Record, Appendix to Brief of Federal Power Commission (C.C.A.) pp. 23-28.

The Circuit Court of Appeals not only found that the opinion and order of the Federal Power Commission were supported by substantial evidence, but further reviewed and rejected Petitioners' contentions, as follows:

"Throughout the argument and briefs it has been contended, not so much on the part of the commission as on the part of those aligned with it, that the case in the end comes down to this, that Louisiana, under the guise of conservation against waste, is trying to monopolize for use in Louisiana, the gas the state produces, and it is urged upon authority that this can not be done. The petitioners deny that they are trying to prevent proper movement of gas in interstate commerce. They insist that all that they are doing is to present evidence that the use to which the gas will be put under the certificates is a most inferior one, and that this being undisputed, the commission, as matter of law, could not grant the certificates and we must set them aside. \* \* \* Viewing petitioners' contention in the light most favorable to them, the best that can be said upon this record for petitioners is that they made an issue upon whether the fact that some of the gas to be taken under the certificates will be put to inferior uses was sufficient to cause a denial of the certificates. The commission thoughtfully and sympathetically considered the evidence tendered and determined that certificates qualified as they were qualified should issue. In so doing, it exercised the power of judgment confined to it and not to the courts." (R.66).

#### **STATEMENT OF THE CASE.**

The nature of the questions presented makes it unnecessary to set forth an extended review of the case, but the Circuit Court of Appeals' statement of the case is so clear and concise that we are quoting therefrom, as follows:

"Beginning its operations as an interstate pipe line company in 1928, its system consisted of an 18-inch pipe line extending from the Monroe, Louisiana, gas field through the States of Arkansas, Mississippi, and to Memphis, Tenn. For the past seventeen years it has supplied natural gas to various city gas utility distributing companies, in the States of Arkansas, Mississippi, and Tennessee, the principal customer being the City of Memphis Tennessee.

"In 1940, it began a construction program of a loop line paralleling its original 18-inch pipe line from the Monroe field to Memphis. The proposed plan was to loop completely this line over a period of years. The purpose of the construction program was to provide pipe line capacity to meet the increased demands of its city gas customers.

"In 1940, 92 miles of the looping were completed; in 1941, an additional 55 miles were constructed; in 1942, and also in 1943, the company attempted to complete the loop line construction, but, due to war emergency conditions, the materials and priority assistances were unavailable, and it was not until December, 1943, that the War Production Board granted approval and permit to construct the balance of the loop line.

"In connection with the construction of the lines in 1940 and 1941, it was not necessary for the company to obtain a certificate from the Federal Power Commission. However, Section 7 of the Natural Gas Act was amended as of Feb. 7, 1942, and it became necessary for the company to obtain from the Federal Power Commission a certificate of public convenience and necessity to construct the balance of the loop line.

"On Jan. 31, 1944, it filed with the Federal Power Commission its application for a certificate of public convenience and necessity for the construction and operation of 62.5 miles of loop lines. Intervening in this proceeding were the State of Tennessee, the Memphis Light, Gas & Water Division of the City of Memphis, Tennessee, and The Independent Natural Gas Association of America, supporting the application, and the Public Service Commission of Louisiana, the Department of Conservation of the State of Louisiana, and the National Coal Association, the United

Mine Workers of America, the Order of Railway Conductors, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Engine-men, and the Switchmen's Union of North America, opposing it.

"On May 20, 1944, the company filed with the Commission an application for a certificate of public convenience and necessity for the construction and operation of a gas transmission line from Guthrie, Louisiana, in the Monroe gas field to Lisbon gas field in Claiborne Parish, Louisiana.

"The same parties supporting and opposing the granting of the first certificate oppose this one also.

"On June 10, 1944, the Commission, stating in its opinion and order that a sufficient showing of adequate gas reserve had not been made, denied and dismissed without prejudice the application for the certificate in the looping project. A petition for rehearing, reconsideration and reversal of the Commission's order of June 10, 1944, was made and granted and an opportunity to present further evidence was provided.

"The two Dockets involving the certificates for the looping project and the Lisbon line were consolidated by order of the Commission, and a hearing in the consolidated causes began on September 7, and was concluded on Oct. 5, 1944. On Nov. 21, 1944, the Commission entered its Opinion and order, issuing certificates of public convenience and necessity for the construction and operation of both the loop line and the Lisbon line." (R. 59-61.)

Incidentally, we desire to state that Pipeline Company subsequently and timely filed with the Federal Power Commission all definitive contracts required by the Commission's opinion and order.

On March 31, 1945, the Circuit Court of Appeals rendered its opinion approving the order of the Federal Power Commission, and on April 18, 1945, denied the petition for rehearing.

On May 21, 1945, the Circuit Court of Appeals entered an order staying "the execution, effectiveness and oper-

ation" of the Federal Power Commission's opinion and order and the affirming opinion and decree of the Circuit Court of Appeals "pending final disposition of Petitioners' petition to the Supreme Court of the United States for a writ of certiorari."

The stay order was entered on ex parte application and without requiring Petitioners to give security for damages and costs, as provided in 28 U. S. C. Sec. 350.

### **ARGUMENT.**

The petition does not present any important question of federal law which has not been but should be settled by this Court, and the issues arising under the petition are not national in their scope.

Although the contentions of the Petitioners are ostensibly based upon the grounds of conservation, the record clearly shows that their real motive is to prevent the exportation of gas in interstate commerce and thereby compel industry to locate in Louisiana. The record further shows that while Petitioners voice opposition to the exportation of gas for industrial use in other states, Louisiana permits and encourages the unlimited use of gas for industrial purposes in Louisiana. (Testimony, H. W. Bell, Appendix A to Brief of Memphis Natural Gas Company (C.C.A.), pp. 176-186; Testimony of Governor Jimmie H. Davis, Appendix A to Brief of Memphis Natural Gas Company (C.C.A.), pp. 186-190.)

To the extent that Louisiana is interested in the practice of conservation, its rights flow from state statutes and regulations which are in no wise impaired, limited or affected by the order of the Federal Power Commission involved herein. The record shows that the Department of Conservation of the State of Louisiana is and has been regulating the production of natural gas in the state without interference by the Federal Power Commission. (Testimony, H. W. Bell, Appendix A to Brief of Memphis Natural Gas Company (C.C.A.), pp. 177-179.)

Insofar as the questions raised by Petitioners are germane to this proceeding, they are matters which Congress has entrusted to the Federal Power Commission and, in the exercise of the discretion so vested in it, the Federal Power Commission has granted the certificates.

The language of the United States Supreme Court in the case of *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 612, 88 L. Ed. 276, is so pertinent that we quote therefrom as follows:

“Congress has entrusted the administration of the Act to the Commission, not to the courts. Apart from the requirements of judicial review it is not for us to advise the Commission how to discharge its functions.”  
(320 U. S. 617, 618)

In the dissenting opinion in the same case, the same interpretation of the Act is stated by Mr. Justice Jackson at page 660:

“It [Federal Power Commission] is entitled to its own notion of the ‘public interest’ and its judgment of policy must prevail \* \* \*.”

The petition filed in this Honorable Court shows upon its face that the only justiciable issue presented by the petition is a mere dispute concerning the conclusion to be drawn from the proof. The order of the Commission sought to be reviewed in this Honorable Court rests not only upon the voluminous record of protracted hearings, but also upon the experience and expert knowledge of the members of the Commission in a highly specialized and complex field of administrative law. In the very Act from which the right of review arises, Congress has deemed it wise to entrust to the Commission the making of the findings of fact, and this Honorable Court is without jurisdiction or power to substitute its judgment on the evidence for the judgment of the Commission; and it necessarily follows that the petition for writ of certiorari is so wanting in

merit as to cause it to be frivolous and without any support whatever in reason, and obviously was filed only for delay.

No principle of law is now more firmly established than that the courts shall not encroach upon the power of special administrative agencies created by Congress, whose findings are made conclusive *where supported by evidence*, and that the courts can not substitute their judgment on disputed evidence for that of the administrative agency, and whether the courts would reach the same conclusion from conflicting evidence is immaterial.

*Federal Power Commission v. Hope Natural Gas Co.*,  
320 U. S. 591, 88 L. Ed. 276, 290;  
*Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 86 L. Ed. 1037;  
*Public Utilities Commission v. United Fuel Gas Co.*,  
317 U. S. 456, 87 L. Ed. 396;  
*Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498, 510, 86 L. Ed. 371, 378;  
*Rochester Telephone Corp. v. U. S.*, 307 U. S. 125, 128,  
83 L. Ed. 1147, 1161;  
*Federal Trade Commission v. Pac. States Paper Trade Assn.*, 273 U. S. 52, 63, 71 L. Ed. 534;  
*Federal Trade Commission v. Algoma Lumber Co.*,  
291 U. S. 67, 73, 78 L. Ed. 655;  
*Dobson v. Comm. of Internal Rev.* 320 U. S. 489, 88 L. Ed. 179, 185-186;  
*N. L. R. B. v. Falk Corp.*, 308 U. S. 453, 461, 84 L. Ed. 396, 400;  
*Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678,  
88 L. Ed. 749, 750;  
*N. L. R. B. v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 86 L. Ed. 1305;  
*N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 85 L. Ed. 368, 378;  
*N. L. R. B. v. Automotive Maintenance Machinery Co.*,  
315 U. S. 282, 86 L. Ed. 848;  
*N. L. R. B. v. Waterman Steamship Corp.*, 309 U. S. 206, 208-9, 226, 84 L. Ed. 704, 707, 716;  
*Swayne & Hoyt, Ltd. v. U. S. A.*, 300 U. S. 297, 81 L. Ed. 659;

**DELAY IN DISPOSITION OF PETITION WILL BE PREJUDICIAL TO PUBLIC INTEREST.****Emergency of the Case.**

The effectiveness of the order of the Federal Power Commission is stayed by order of the Circuit Court of Appeals pending a decision on the petition for a writ herein, and no security for damages has been required. A delay in considering the petition will result in an unfortunate interference with, and interruption of, the construction of the pipeline facilities which are so urgently needed by the consuming public in the City of Memphis and in other communities served by the Pipeline Company. The construction of these facilities must be completed before the coming winter in order to prevent serious suffering and hardship, and it can only be accomplished by the prompt commencement of construction work so as to take advantage of the favorable weather during the summer months.

The importance of the proposed facilities and the urgency for their prompt construction are further indicated by the following telegram of the War Production Board introduced at the hearing before the Federal Power Commission:

**“WAR PRODUCTION BOARD  
OFFICE OF WAR UTILITIES**

September 8, 1944

FEDERAL POWER COMMISSION  
ROOM 339 FEDERAL BUILDING  
MEMPHIS, TENNESSEE

PROPOSED CONSTRUCTION FOR WHICH  
MEMPHIS NATURAL GAS COMPANY IS RE-  
QUESTING CERTIFICATE OF CONVENIENCE  
AND NECESSITY AT HEARING NOW BEING  
CONDUCTED IS CONSIDERED BY OFFICE OF  
WAR UTILITIES TO BE A PROJECT OF MAJOR  
IMPORTANCE. CAREFUL CONSIDERATION  
WAS GIVEN TO THIS PROBLEM BEFORE PRI-  
ORITY ASSISTANCE WAS GRANTED. HIGH

PEAK DAY REQUIREMENTS ENTERED INTO CONCLUSIONS. IN ORDER TO MAINTAIN PROPER SUPPLY OF GAS FOR WAR PRODUCTION AND CIVILIAN REQUIREMENTS IN AREAS SERVED BY THIS COMPANY, PARTICULARLY THE GREATER MEMPHIS AREA, WE URGE FAVORABLE CONSIDERATION OF THIS COMPANY'S APPLICATION.

/s/ EDWARD FALCK  
WPB, UTILITIES"

Appendix A to Brief of Memphis Natural Gas Co.  
(C.C.A.) p. 119.

#### CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALDEN T. SHOTWELL,  
Ouachita Bank Building,  
Monroe, Louisiana.

T. A. McEachern, Jr.,  
20 Pine Street,  
New York, New York.

*Attorneys for  
Memphis Natural Gas Company.*

CHARLES C. CRABTREE,  
Union Planters Bank Building,  
Memphis, Tennessee.

HAMILTON E. LITTLE,  
Commerce Title Building,  
Memphis, Tennessee.

*Attorneys for  
Memphis Light, Gas and Water  
Division of the City of Memphis.*

June 1, 1945.

